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Supreme Court, U.S.
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No. _____

In the

Supreme Court of the United States

COUNTY OF SAN BERNARDINO and GIANT INLAND EMPIRE R.V. CENTER, INC.,
Petitioners,

vs.

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION,
Respondent.

On Petition for Writ of Certiorari to the Court of Appeal of the State of California, Fourth Appellate District, Division Two

---

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Respondent Bank of America claims a lienholder's interest in certain real property. Petitioner Giant Inland Empire R.V. Center, Inc., purchased the property at a tax auction conducted by petitioner County of San Bernardino, California. Respondent Bank claims it did not receive due process notice of the auction.

1. Did respondent Bank of America receive notice satisfying the Due Process Clause, under the holding of this Court in Mennonite Board of Missions v. Adams, 462 U.S. 791, 800, 103 S.Ct. 2706, 77 L.Ed. 2d 180 (1983), when the county tax collector published notice, posted notice on the affected property, and mailed notice of a tax auction regarding real property in which the Bank claimed a security interest, ***to the address shown on Bank's deed of trust,*** even though the mailed notice was returned by the Postal Service before the tax auction as "undeliverable" because, unbeknownst to the tax collector, the Bank no longer received mail at the address shown on the deed of trust?

2. Did the Due Process Clause require the county tax collector ***to buy a preliminary report of title*** (or undertake other affirmative measures as certain) to determine respondent Bank of America's current address for the purpose of giving notice of the tax auction?

3. Did the Due Process Clause require mailed notice of the tax auction to respondent Bank of America, an institutional lender, even though the Bank was ***already aware that the past due taxes were substantial and had to be paid without delay to avoid tax sale?***

PARTIES TO THE PROCEEDING

Giant Inland Empire R.V. Center, Inc. (Giant), a California corporation, is the petitioner. Giant does not have a parent company, and no publicly held company owns 10% or more of Giant's stock. The County of San Bernardino (County) is a political subdivision of the State of California and a petitioner by joinder. (Supreme Court Rule 12 (4).)

Bank of America National Trust and Savings Association (Bank) is the sole respondent.

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OPINIONS BELOW

The opinion of the Court of Appeal of the State of California is reported at 78 Cal.App. 4th 1267 (2000). (Petitioner's Appendix, pages 1-26 [PA 1-26].)

The order of the Supreme Court of California denying review on June 14, 2000, is unreported. A copy of that order is in Petitioner's Appendix at page 27. (PA 27.)

A copy of the Statement of Decision dated March 19, 1998, by the Superior Court of the State of California for the County of San Bernardino, Central District, Case No. SCV-15956, is in Petitioner's Appendix at pages 28 through 33. (PA 28-33.) A copy of the Judgment dated March 11, 1998, by the Superior Court in favor of County and Giant is in Petitioner's Appendix at pages 34 through 36. (PA 34-36.)

JURISDICTION

The judgment of the Court of Appeal of the State of California was entered on March 13, 2000. (PA 1-26.) The Supreme Court of California denied review, *en banc*, on June 14, 2000. (PA 27.) The jurisdiction of this Court is invoked under 28 U.S.C. § 1257. (Interstate Circuit, Inc. v. City of Dallas, 390 U.S. 676, 678, fn. 1, 88 S.Ct.1298, 20 L.Ed. 2d 225 (1968).)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause of Section 1 of the Fourteenth Amendment of the United States Constitution declares that:

> "No State shall ... deprive any person of life, liberty, or property, without due process of law ... ."

Section 3701 of the California Revenue and Taxation Code provides for mailed (due process) notice of tax auctions as follows:

> "Not less than 45 days nor more than 120 days before the proposed sale, ***the tax collector shall send notice of the proposed sale by certified mail with return receipt requested to the last known mailing address, if available, of parties of interest,*** as defined in Section 4675. The notice shall state the date, time, and place of the proposed sale, the amount required to redeem the property, and the fact that the property may be redeemed up to the close of business on the last business day prior to the date of sale, and information regarding the rights of parties of interest to claim excess proceeds, as defined in Section 4674, if the property is sold and excess proceeds result from that sale.

> "The tax collector shall make a reasonable effort to obtain the name and last known mailing address of parties of interest.
>
> *" The validity of any sale under this chapter shall not be affected if the tax collector's reasonable effort fails to disclose the name and last known mailing address of parties of interest or if a party of interest does not receive the mailed notice."* (PA 41-45 [emphasis added].)

Other pertinent portions of the California Revenue and Taxation Code relating to tax auctions are included in the Petitioner's Appendix at pages 37 through 62. (California Revenue and Taxation Code §§ 3691, 3691.1, 3691.2, 3692, 3693, 3693.1, 3698.5, 3701, 3702, 3703, 3704, 3706, 3707, 3708, 3708.1, 3708.5, 3170, 3711, 3712, 3725, 3726, 3727, 3728, 3728.1, 3729, 4674, and 4675.)

STATEMENT OF THE CASE

1. ***Review of the Federal Questions Was Sought at Each Stage of the State Court Proceedings.***

The federal questions for which review is sought were raised at each stage of the state court proceedings, beginning at the trial court level. The underlying complaint (Complaint) in this action is by Bank to invalidate the tax sale by County to Giant of certain real property (Property) in which Bank claims a security interest. Bank premised the Complaint on an alleged violation of the Due Process Clause arising from the methodology employed by County to give notice to Bank of the tax auction. (PA 63-78, 71 [¶23(e)].)

Ruling in favor of County and Giant on March 19, 1998, the trial court (the Superior Court of the State of California for the County of San Bernardino) found that County's notice methodology satisfied Due Process, in pertinent part, as follows:

> "Was plaintiff [Bank], as a party of interest, entitled to actual receipt of notice from the county? No. Revenue and Taxation Code Section 3701 provides that the validity of any sale shall not be affected if a party in interest does not receive the mailed notice.
>
> "The method chosen by the county, however, must be reasonably calculated to

give actual notice. This is a requirement of the due process clause of the Fourteenth Amendment. Mennonite Bd of Missions v. Adams, 103 S.Ct. 2706, 2709. The county's efforts in this case were reasonably calculated to give notice. The publishing, posting, and, in particular, the mailing of notice to the last known address of plaintiff, meet the requirements of due process.

"The county's use of a lot book guarantee was sufficient as it supplied the last known address of plaintiff. The requirements of due diligence are met under the circumstances of this case.

* * * *

"The court finds that the county used a procedure reasonably calculated to give notice, and that the evidence is insufficient to establish that there was timely notice that the address used for plaintiff was invalid. The court notes in passing, plaintiff's efforts to either avoid or participate in a tax sale were too little and too late. Due process does not require the tax collector to save a party from its own failure to act reasonably in protecting its own interests.

> "The court awards judgment to the defendants [County and Giant] plus court costs." (PA 31, 32-33.)

On appeal, the Court of Appeal of the State of California, Fourth Appellate District, Division Two, reversed the judgment upholding the tax sale of the Property to Giant, on the ground that "County failed to give reasonable notice of the tax sale to Bank." (PA 2.) The California Court of Appeal acknowledged that actual notice was not required by the Constitution, but rather that "'"[t]he means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it ... ." [Citation.]' [Citation.]" (PA 8.)

The Court of Appeal summarized the facts as follows:

> "In this case, there is no dispute that (1) County ordered a lot book report and documents identified in the lot book report to obtain Bank's last known mailing address, (2) The lot book report revealed Bank's post office address, as provided in the Trust Deed, (3) County mailed its notice regarding the tax sale to Bank's post office address, (4) Bank had closed its post office box, (5) Bank did not record a change of address, (6) Bank did not notify County regarding its change of address, (7) Bank did record a Default Notice, (8) The lot book report did not refer to the Default

Notice, and (9) Bank did not receive the tax sale notice." (PA 8-9 [emphasis added].)

On these facts, the Court of Appeal found that reliance on a lot book report did not comport with County's obligation to find Bank's "last known mailing address" under the Due Process Clause of the United States Constitution. (PA 9, 12.) The Court of Appeal relied heavily on expert testimony that County should have obtained a preliminary title report, so that County would have found Bank's notice of default to its delinquent borrowers, the Property's pre-tax-sale owners. (PA 9-11.) The Court of Appeal recognized that Bank's trust deed (Trust Deed), by its own terms, announced that the address to which notices regarding it should be sent was the very post office address used by County. (PA 11.) The Court of Appeal also recognized that Bank neither recorded a change of address for the Trust Deed, nor notified County of its change in address; yet the Court reasoned that if County had obtained another document recorded by Bank (a notice of default under the Trust Deed), County would have divined that the new address to which Bank wanted notices concerning the Trust Deed sent was the address provided to Bank's borrowers (the Peskins) "[to] find out what [they] must pay ... to stop the foreclosure ... ." (PA 11, 12; *post* pp. 10-11.)

The Court concluded that County failed to satisfy the Due Process Clause as follows:

"In conclusion, we hold that the County's sole reliance on a lot book report, which

> would not provide notice of documents recorded after the creation of a lien, does not constitute a reasonable effort to obtain the "last known mailing address of parties of interest" under [California Revenue and Taxation Code] section 3701. Hence, notice provided to addressees based solely on information obtained from a lot book report is not "'notice reasonably calculated, under all circumstances, to apprise interested parties'" of the tax sale. (Mennonite, supra, 462 U.S. 791, 795 [103 S.Ct. 2706, 77 L.Ed.2d 180, 185].)." (PA 12.)

The Court of Appeal also found (contrary to the trial court) that the mailed notice to Bank had been returned to County, undelivered, before the tax auction. (PA 21.) On this finding of fact, the Court of Appeal determined that there was an additional violation of Bank's rights under the Due Process Clause, as follows:

> "[O]nce County became aware that Bank had not received notice regarding the tax sale, it knew that mailing the notice to the defunct post office box was futile. At that time, County should have made reasonable efforts to renotify Bank about the tax sale at an alternate address. In this case, the effort would have been minimal, as the address of Bank of America could be easily obtained. Because County failed to make any effort at all to renotify Bank about the

> tax sale, Bank's due process rights were violated and it has the right to set aside the tax sale." (PA 21.)

The federal questions for which review is sought were again raised by Giant in its "Petition for Rehearing" to the Court of Appeal on March 24, 2000, and in its "Petition for Review" to the Supreme Court of California on April 18, 2000. Following the Court of Appeal's denial of rehearing, the California Supreme Court declined review, without comment, on June 14, 2000. (PA 27.)

2. *Statement of the Facts.*

(A) *County Gave Notice to Bank at the Address to Which Bank Requested Notices.*

Leon and Patricia Peskin owned the Property, an auto showroom and service center located in the County of San Bernardino. (Joint Appendix of the parties before the California Court of Appeal [JAB (Joint Appendix Below)] 4:11-18.) In 1987, Bank made a loan to the Peskins secured by a trust deed (Trust Deed) on the Property. (Reporter's Transcript from the trial [RT] 177-179; JAB 691-692, 693-696.) The Trust Deed was recorded on July 22, 1987. (PA 68; JA 694.)

The address for Bank as shown on page one of the Trust Deed is as follows:

> "Bank of America NT & SA
> P.O. Box 7127
> Pasadena, Ca 91101
> Lender
> Attn: Jim Davis, AVP" (PA 3, 77; JAB 694.)

Paragraph 10 of the Trust Deed states, in pertinent part, that notices to Bank (called "Lender" in the Trust Deed) ***shall be given to Bank at that address,*** as follows:

> "Any notice to Lender shall be given by first class mail to Lender's address stated herein or any other address Lender

> designates by notice to Borrower. Any notice provided for in this Security Instrument shall be deemed to have been given to ... Lender when given as provided in this paragraph." (PA 3, 78; JAB 695 [emphasis added].)

At paragraph 16 of the Trust Deed, Bank advises the world that notices of foreclosure of liens with priority over the Trust Deed (such as tax liens) ***should be provided to Bank at the same address,*** as follows:

> "Lender requests that copies of notices of foreclosure from the holder of any lien which has priority over this Deed of Trust be sent to Lender's address as set forth on page one of this Deed of Trust, as provided by Section 2924b of the Civil Code of California." (JAB 696; PA 78, 3.)

The post box shown as Bank's address regarding the Trust Deed was closed by Bank by written notice to the Postal Service on September 16, 1988. (RT 35; JAB 689.) ***Bank failed to record a new address for giving notices regarding the Trust Deed.*** (PA 9.) Indeed, despite warnings to Bank from its own staff (before the tax sale to Giant) that the past due taxes were "substantial" and that they "must be paid without delay to avoid tax sale," ***Bank never notified County that the address for the Trust Deed had changed.*** (PA 9; JAB 883.)

Bank recorded a notice of default (Default Notice) regarding the loan to the Peskins secured by the Trust Deed, on August 6, 1992. However, the Default Notice is directed to the Peskins, advising them that their Property is in foreclosure and in danger of being sold to pay their indebtedness to Bank. (JAB 698, 874.) Page one of the Default Notice provides two different addresses and each is different from the address for Bank shown on the Trust Deed. However, ***the instructions on the Default Notice indicate that neither address on the Default Notice is for the purpose of giving notice to Bank regarding the Trust Deed.*** (*Ibid.)*

The first address in the upper left corner of page one of the Default Notice is to "Equitable Deed Company." (JAB 698, 874.) The accompanying instruction merely indicates to the County Recorder that Equitable Deed Company has requested recording of the Default Notice, and that "when recorded" the Default Notice should be mailed to Equitable (not Bank). (*Ibid.*)

The second address in the sixth paragraph on page one of the Default Notice is as follows:

> "To find out the amount you [i.e. Bank's borrowers] must pay, or to arrange for payment to stop the foreclosure, or if your property is in foreclosure for any other reason, contact:
>
> BANK OF AMERICA NT & SA, SPECIAL ASSETS GROUP/DEALER CORP. SERVICES. ATTN: MICHAEL A. SLATE, V.P., 555 So. Flower Street, 9th Floor, Los

Angeles, CA 90071, (213) 228-2990 (213) 228-2988" (JAB 698, 874 [emphasis added].)

Thus the instructions accompanying the second address indicate that they are directed to the Peskins ("you") and that the address and telephone numbers given are for purposes of answering the Peskins' questions concerning the Bank's foreclosure, and of arranging for the payment of the Peskin loan. Neither the address, the Bank division, the telephone numbers, nor the Bank employee's name appear on the Trust Deed. (PA 77-78; JAB 694-696)

Accordingly, ***nothing on the Default Notice suggests that it affords an address for giving notices to Bank regarding priority liens (such as tax liens).*** On the contrary, the Default Notice is directed specifically to the Peskins for the purpose of addressing their inquiries.

In or about February 1994, in accordance with its California statutory duty, County initiated proceedings to sell the Property for non-payment of property taxes. (JAB 717:2-4; Cal. Rev. and Tax Code §3691 [PA 37], et seq.) County gave notice of the tax auction to Bank and other parties of interest in three ways: (1) County posted notice on the Property itself on March 15, 1994. (PA 70, 81 [93]; JAB 717.) (2) County published notice of the intended tax sale "for three successive weeks in a newspaper of general circulation". (PA 81 [¶ 3]; JAB 717; see Cal. Rev. and Tax Code §3702 [PA 46] Cal. Evid. Code §664.) (3) On February 5, 1994, County mailed notice to Bank by certified mail to Bank's post box address as shown on the Trust Deed. (PA 81 [¶ 3]; JAB 688, 717.)

Because Bank had closed the post box shown as its

address on the Trust Deed, Bank did not receive the mailed notice. (PA 81 [¶3]; JAB 717.) The mailed notice was returned to County with the notation, "Return to Sender, Forward Order Expired, Unable to Forward." (*Ibid.*)

On or about March 28, 1994, the Property was sold by County at tax auction to Giant, the highest bidder, for $280,000. (PA 81 [¶5]; JAB 717, 858; see Cal. Rev. and Tax Code §3706 [PA 48-49].)

(B) County Found Bank's Trust Deed.

It is undisputed that a lot book guarantee was ordered by County to determine the parties of interest with respect to the Property, rather than a preliminary report. (PA 8; RT 73:7-15, 74:6-15.) In addition, County requested copies of instruments identified in the lot book guarantee. (RT 76:4-7.) It is also undisputed that County discovered Bank's Trust Deed, and, hence, Bank's interest in the Property, by this mechanism, and gave mailed notice to Bank at Bank's address as shown on the Trust Deed. (PA 8-9, 81; JAB 717, 673, 767.)

One of the reasons County orders lot book guarantees from title companies rather than preliminary reports of title is that lot book guarantees are less expensive. (RT 95:13-14.) The number of properties (including the Property) placed on sale at County's 1994 tax auction is large: 1,427 parcels. (RT 170:23, 173:14-24.) The lot book guarantee in this case cost $100. (JAB 766.) The extra cost of preliminary reports is considerable -- at least $100 to $150 more per report. (RT 261:10-12.) At $100 to $150 more per report, the extra cost to County for

preliminary reports rather than lot book reports would have been between $142,700 and $214,050 for this one tax auction alone.

On the facts of this case, there is no occasion to wonder if a more expensive method should have been employed to find parties of interest. What would County have achieved by ordering a preliminary report or, for that matter, hiring Bank's expert to research the Property's title, at far greater expense? ***County would have found Bank's Trust Deed, just as County found it with the lot book guarantee.*** The Trust Deed states that notices should be given to Bank at the address shown on the Trust Deed, just as County gave notice to Bank.

(C) Bank Ignored the Impending Tax Sale.

Bank was well aware that the Property was in tax-default status and subject to sale long before Bank called County ***one day after the sale*** (!) to inquire as to its status. (PA 5; RT 180:24 to 181.) Indeed the Property was already in default when Bank ordered a preliminary report in connection with making the Peskin loan in June 1987. (JAB 872.) The Default Notice itself states that as of August 6, 1992, the default consists, not only of failure to pay principal and interest on the Peskin loan, but also:

> "FAILURE TO PAY DELINQUENT TAXES IN THE APPROXIMATE AMOUNT OF $154,488.00 PLUS PENALTIES AS OF THE DATE OF THIS NOTICE." (PA 4; JAB 876.)

By letter dated September 8, 1992, the foreclosure trustee on the Default Notice urged Bank to review the Trustee Sale Guarantee for that foreclosure "as it may contain information that can affect your interest in the property (e.g. delinquent property taxes ...)." (JAB 873.) Internal Bank memoranda also warned that the tax sale loomed. (JAB 881, 883.) For example, an internal memorandum dated October 15, 1992, warns:

> "The past due property taxes are substantial, about $142,000, and must be paid without delay to avoid a tax sale." (JAB 883, emphasis added.)

Why then did Bank ignore the tax auction? The facts suggest an internal foul-up. The Bank officer who was monitoring the Property was fired in mid-March 1994, literally days before the auction. (RT 177:14-27.) The file was assigned to another Bank officer, Ms. Dawn Kinney, who was scheduled to start vacation the following week. (RT 180:14-16.) Ms. Kinney enquired of her boss and he said, "Don't worry, start these files when you get back." (RT 180:17-18.)

Ms. Kinney returned from her vacation on the day of the auction, March 28, 1994, and reviewed the Peskin file the next day, March 29, 1994 (!). (RT 180:20-27.) She then called County and was advised of the sale. (RT 181:13-19.)

REASONS FOR GRANTING THE WRIT

1. Summary of Reasons for Granting Certiorari.

The opinion of the California Court of Appeal in this case imposes a dramatic, unprecedented increase in the state's constitutional burden to search for addresses to give notice before taking actions affecting property interests. Indeed the opinion indicates that, in order to satisfy constitutional due process, tax collectors have an affirmative constitutional obligation to buy preliminary reports of title (or undertake other measures as certain) to determine whether the address for an institutional lender as shown on the deed of trust under which the lender claims a security interest in a property subject to tax sale is the lender's current address for the purpose of giving notice of the tax auction. (PA 10-11.) Although the opinion arises in the circumstances of a tax sale, and thereby poses a direct threat to the state's ability to collect overdue property taxes, there is no reasoned basis for limiting its constitutional direction to that context. The California Court of Appeal has decided this important Due Process question contrary to the relevant decisions of this Court. (Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314-315, 70 S.Ct. 652, 657, 94 L.Ed. 2d 865, 873 (1950); accord Mennonite Board of Missions v. Adams, supra, 462 U.S. 791, 795, 103 S.Ct. 2706, 2709, 77 L.Ed. 2d 180.)

2. *Certiorari Should be Granted Because the California Court Has Decided an Important Federal Question in a Way That Conflicts With Relevant Decisions of This Court.*

(A) *Due Process Was Satisfied When County Selected a Means Likely to Inform Bank.*

The relevant decisions of this court show that the notice given by County to Bank complied with the Due Process Clause. (Mullane v. Central Hanover Bank & Trust Co., supra, 339 U.S. 306, 314-315, 70 S.Ct. 652, 657, 94 L.Ed. 2d 865, 873; accord Mennonite Board of Missions v. Adams, supra, 462 U.S. 791, 795, 103 S.Ct. 2706, 2709, 77 L.Ed. 2d 180.)

Before the opinion of this Court in Mennonite Board of Missions v. Adams, supra, 462 U.S. 791, 103 S.Ct. 2706, 77 L.Ed. 2d 180, it had been assumed that notice of tax auctions by publication satisfied the Due Process Clause. The theory underlying this assumption was that, because annually assessed *ad valorem* property taxes are well known to property owners (and their mortgagees), if the owners (mortgagees) have not paid the taxes, they are bound to know their properties may be sold to satisfy the delinquency. (See Mennonite Board of Missions, supra, 462 U.S. at 807-809 (dis. opn. of O'Connor, J.); accord Weigner v. City of New York, 852 F.2d 646, 651 (2d Cir. 1988), cert. den. 488 U.S. 1005, 109 S.Ct. 785, 102 L.Ed. 2d 277 (1989); egs. Louisville & N.R. Co. v. Bosworth, 209 F. 380, 439-440 (D.C. KY. 1913); Chesney v. Gresham, 64 Cal.App. 3d 120, 129 (1976) cert

den. 432 U.S. 907, 97 S.Ct. 2952, 53 L.Ed. 2d 1079; Philbrick v. Huff, 60 Cal.App. 3d 633, 647 (1976).) In Mennonite Board of Missions this Court held that notice of tax auctions by publication alone is inadequate, and that notice by mail or other means as certain to ensure actual notice is a minimum constitutional precondition to a proceeding that will adversely affect the property of any party, if the party's name and address are reasonably ascertainable. (Mennonite Board of Missions, supra, 462 U.S. at 800.)

The key to satisfying Due Process is the reasonableness of the means by which notice is given, under the pertaining circumstances. As explained by this Court in the landmark case of Mullane v. Central Hanover Bank & Trust Co. supra, 339 U.S. 306, 314-315, 70 S.Ct. 652, 657, 94 L.Ed. 865, 873:

> "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. [Citations.] The notice must be of such nature as reasonably to convey the required information .... But if with due regard for the practicalities and peculiarities of the case these conditions are reasonably met, the constitutional requirements are satisfied." (Emphasis added.)

These principles were applied by this Court in Mennonite Board of Missions, supra, 462 U.S. 791, to the tax sale context. Mennonite involved a mortgagee of record whose security interest in mortgaged premises had been subordinated to the rights of a purchaser of the premises at a tax foreclosure sale. (Mennonite, supra, 462 U.S. 793, 795.) In contrast with the notice given herein by both mail, publication, and posting ***on the Property itself***, in Mennonite, the only notice of the sale given to the appellant mortgagee was a notice posted in the county courthouse and published for three successive weeks. (Mennonite, supra, 462 U.S. at 793, 794.) The Indiana courts had held that the purchaser of the mortgaged premises at the tax foreclosure sale took title free of the lien of appellant's mortgage. (Id. at 795.)

This Court reversed the Indiana court's decision, holding that the due process clause entitled appellant, as a mortgagee of record, to more than published notice of the sale. The Court said:

> "When the mortgagee is identified in a mortgage that is publicly recorded, constructive notice by publication must be supplemented by notice mailed to the mortgagee's last known available address, or by personal service. But unless the mortgagee is not reasonably identifiable, constructive notice alone does not satisfy the mandate of Mullane." (Mennonite, supra, 462 U.S. at 798.) (Emphasis added.)

This Court found that although the mortgage on file with the county recorder identified the mortgagee only as "MENNONITE BOARD OF MISSIONS a corporation, of Wayne County, in the State of Ohio," the county could have ascertained the mortgagee's address through reasonably diligent efforts. (462 U.S. at 798, fn. 4.) The Court also noted that:

> "Simply mailing a letter to 'Mennonite Board of Missions, Wayne County, Ohio,' quite likely would have provided actual notice, given the well-known skill of postal officials and employees in making proper delivery of letters defectively addressed." (Mennonite, supra, 462 U.S. at 798, fn 4.)

The contrast between Mennonite and the present circumstances is telling. Not only did County mail notice to Bank's address of record as shown on Bank's Trust Deed, but gave notice as well ***by posting the Property itself*** and by publication. On this point the Mennonite Court's cautionary words are important:

> "We do not suggest, however, that a governmental body is required to undertake extraordinary efforts to discover the identity and whereabouts of a mortgagee whose identity is not in the public record." (Mennonite Board of Missions, supra, 462 U.S. at 798, fn. 4.)

The principles of Mullane and Mennonite were later applied by the California Court of Appeal, in a case decisive to the Court of Appeal's analysis herein, Sinclair & Valentine Co. v. County of Los Angeles, 201 Cal.App.3d 1021 (1988). (PA 8, 14-16.) The circumstances in Sinclair & Valentine also provide an instructive contrast with those herein.

In Sinclair & Valentine the plaintiff owned two unimproved parcels in Santa Fe Springs, California. (Sinclair & Valentine, supra, 201 Cal.App.3d at 1024.) When the plaintiff moved from New York to Ohio in 1973, the defendant county's records were updated with the new address for one of the parcels, but not for the other. *(Ibid.)* The tax bills for the parcel with the changed Ohio address were paid, and that parcel was not at issue in the case. The tax bills for the other parcel ("New York parcel"), which continued to carry the New York address, continued to be paid for some 30 months because the bills were forwarded to the plaintiff's new Ohio address. (Sinclair & Valentine, supra, 201 Cal.App.3d at 1024-1025.) After the post office "ceased providing this service," the bills were returned to the county as "undeliverable." (*Id.* at 1025.)

Because the 1976-1977 taxes were not paid on the New York parcel, the county set the parcel for tax auction in 1983. (Sinclair & Valentine, supra, 201 Cal.App.3d at 1025.)

The county conducted a title search and determined that plaintiff owned the New York parcel. (Sinclair & Valentine, supra, 201, Cal.App.3d at 1025.) In the words of the court in Sinclair & Valentine, the county then "inexplicably" gave plaintiff notice of the tax sale at

the same address (the New York address) ***that it knew was no longer valid.*** (Sinclair & Valentine, supra, 201 Cal.App.3d at 1025.) As with the previous tax bills, the notices of the tax auction "were also returned undelivered." (*Ibid.*)

On these facts, the Sinclair & Valentine court found that due process had not been satisfied. However, the basis for this determination was not that the address used by the county was incorrect, and it was not that the tax sale notices were returned, but rather the Sinclair & Valentine court found that due process was violated ***because the county had mailed the notices to an address the county knew was incorrect***; that is, it mailed the notices:

> "[W]ith full knowledge that such notice would be undelivered as addressed. It has long been recognized that 'when notice is a person's due, process which is a mere gesture is not due process . . . . " [Citation.] Although actual notice is not required, '[t]he means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it . . . .' [Citation.]" (Sinclair & Valentine, supra, 201 Cal.App.3d 1021, 1027.) (Emphasis added.)

But Due Process is not a moving target. Once the court finds that the means chosen to give notice was reasonable, the Due Process inquiry ends:

> "The proper inquiry is whether the state acted reasonably in selecting means likely to inform persons affected, not whether each property owner actually received notice. As long as the state employs means 'such as one desirous of actually informing the [property owner] might reasonably adopt to accomplish [that purpose],' then it has discharged its burden. [Citing Mullane, supra, 386 U.S. at 315, 70 S.Ct. at 657.]
>
> * * * *
>
> "[T]he state's obligation to use notice 'reasonably certain to inform those affected' does not mean that all risk of non-receipt must be eliminated .... [Citation.]" (Weigner v. City of New York, supra, 852 F.2d at 649 (emphasis added).

In contrast with the facts in Sinclair & Valentine, ***when County mailed notice to Bank at Bank's address of record as shown on the Trust Deed, County had every reason to believe the address was still valid.*** Indeed, County had every reason to believe it was the address to which Bank wanted notices regarding the Trust Deed. (*Ante*, pp. 9-11.) By giving notice to Bank's address of record, as furnished by Bank, County fully satisfied due process by employing the very means identified by Mennonite and Mullane. (Accord Weigner v. City of New York, supra, 852 F.2d 646, cert. den. 488 U.S. 1005; Rosewell v. Chicago Title and Trust Co., 99 Ill.2d 407, 459 N.E. 2d 966, 76 Ill. Dec. 831 (1984); Matter of Tax Foreclosure No. 35, 127 A.D. 2d 220, 514 N.Y.S. 2d 390

(1987).)

(B) Due Process Did Not Require County to Undertake Extraordinary Efforts to Discover the New Address to Which Bank Wanted Notices Mailed.

The opinion of the Court of Appeal below is based on the holding "that the County's sole reliance on a lot book report ... does not constitute a reasonable effort to obtain the 'last known mailing address of parties of interest' under [California Revenue and Taxation Code] section 3701." (PA 12.) The opinion equates the statutory mandate of section 3701 with minimum Due Process as interpreted by Mennonite. (PA 12.) ***Although the Court of Appeal discusses statutory interpretation, its holding is based squarely on the Due Process Clause.***

California Revenue and Taxation Code section 3701 itself states (in pertinent part) that the tax sale to Giant is unaffected by Bank's failure to receive the tax sale notice, as follows:

> "The validity of any sale under this chapter shall not be affected if the tax collector's reasonable effort fails to disclose the name and last known mailing address of parties of interest ***or*** [in the disjunctive] ***if a party of interest does not receive the mailed notice.***" (PA 45, emphasis added.)

As the California Court of Appeal earlier noted in the case of Philbrick v. Huff, 60 Cal.App.3d 633 (1976), at

page 648:

> "[A]ssuming, arguendo, that it may be said that as a matter of law the tax collector did not make a reasonable effort to ascertain the address of the last assessor, [California Revenue and Taxation Code] ***section 3701 specifically provides that such failure does not affect the validity of the sale.***" (Emphasis added.)

California Revenue and Taxation Code section 3711 amplifies the irrelevance of section 3701's "reasonable effort" requirement, in the factual context of this case, by expressly validating the tax sale to Giant against purported defects in the process, as follows:

> "Except as against actual fraud, the deed duly acknowledged or proved is ***conclusive evidence*** of the regularity of all proceedings from the assessment to the execution of the deed, both inclusive." (Rev. and Tax Code § 3711 [PA 51, emphasis added].)

The term "conclusive evidence" as used in section 3711 "means that which the law does not permit to be contradicted." (Philbrick v. Huff, supra, 60 Cal.App.3d at 644, 649.) All statutory defects in the tax sale process were validated by the curative act, section 3711, upon consummation of the tax sale by delivery of the tax deed. (Barrett v. Brown, 26 Cal. 2d 328, 331-332 (1945); Sinclair

& Valentine Co v. County of Los Angeles, supra, 201 Cal.App.3d 1021, 1026; Litchfield v. County of Marin, 130 Cal.App.2d 806, 811, 812, 813, 817 (1955).)

Because the method of giving notice prescribed by section 3701 "is of legislative direction generally, it is also subject to the curative power of the [California] Legislature." (Barrett v. Brown, supra, 26 Cal. 2d at 331-332.) Any notice the California Legislature can require can also be forgiven by curative legislation. (Litchfield v. County of Marin, supra, 130 Cal.App.2d at 817.) While legislative mandate may be jurisdictional as to subordinate officers, such as tax collectors, the same mandate is nonjurisdictional as to the Legislature and subject to waiver by curative statute. (Litchfield v. County of Marin, supra, 130 Cal.App.2d at 811.) The only notice requirements the Legislature cannot cure are those necessary to constitute compliance with constitutional due process. (*Ibid.*) Accordingly, the only notice issue before the California Court of Appeal in this case was whether the notice to Bank comported with constitutional Due Process. (*Ibid.*)

Thus, properly framed, the only issue before the California Court of Appeal was whether County satisfied constitutional Due Process when County gave mailed notice to Bank at the very address shown on the instrument under which Bank claimed its only interest. (Mennonite Board of Missions v. Adams, supra, 462 U.S. 791, 798.) Because of the curative effect of tax deeds under California law (as discussed above), the Court of Appeal determined, in effect, that tax collectors are constitutionally compelled to buy preliminary reports of title to find addresses for institutional lenders (like Bank)

which may have interests in properties subject to tax sale. (PA 10, quoting with evident approval the testimony of Bank's legal expert at trial: "[A] preliminary title report, at a minimum, should be obtained because it would provide documents recorded subsequent to the original document creating the lien.")

No previous case has placed such a constitutional burden on tax officials. "Mennonite Board of Missions v. Adams ... does not stand for the proposition that the taxing authority carries the entire obligation of discovering and maintaining current addresses of property owners ... ." (Pocius v. Kenosha County, 231 Wis. 2d 596, 610, fn. 5, 605 N.W. 2d 915, 1999 Wisc. App. LEXIS 1286 (1999).) "[T]he state's obligation to use notice 'reasonably certain to inform those affected' does not mean that all risk of non-receipt must be eliminated ... ." (Weigner v. City of New York, supra, 852 F.2d 646, 649, cert. den. 488 U.S. 1005, 109 S. Ct. 785, 102 L.Ed.2d 277 (1989).) The tax collector is not required to make "impracticable and extended searches ... in the name of due process." (Mullane v. Central Hanover Bank & Trust Co., supra, 339 U.S. 306, 317-318.) Nor is the tax collector "required to undertake extraordinary efforts to discover the ... whereabouts of [a party of interest]." (Mennonite Board of Missions v. Adams, supra, 462 U.S. 791, 798, fn. 4; Schwartz v. Dey, 780 S.W.2d 42, 45 (Sup. Ct. Mo. 1989).)

(C) Due Process Did Not Require County to Re-Send the Mailed Notice.

Although the Court of Appeal found (contrary to the trial court) that the tax sale notice was returned before the sale (PA 21), ***County still complied with Due Process.*** Every previous court that has considered this issue has determined that the taxing authority has no constitutional duty to make further effort to find the correct address for the interested party and to re-notice the sale. (Schwartz v. Dey, supra, 780 S.W.2d 42, 44; Pocius v. Kenosha County, supra, 231 Wis. 2d 596, 609, 610; Girrbach v. Levine, 132 A.D. 2d 41, 43, 522 N.Y.S. 2d 276, 1987 N.Y. App. Div. LEXIS 49539 (N.Y. App. Div. 1987); Keiser v. Briggs 181 A.D. 2d 170, 173, 585 N.Y.S. 2d 880, 1992 N.Y. App. Div. LEXIS 9032 (N.Y. App. Div. 1992).)

County acted reasonably: ***County gave Bank "notice reasonably calculated" to apprise Bank of the pendency of the tax auction.*** (Mullane v. Central Hanover Bank, supra, 330 U.S. 306, 314-315.)

That is all that the Constitution requires.

CONCLUSION

For these reasons, the County of San Bernardino of the State of California and Giant Inland Empire R.V. Center, Inc., urge this Court to grant their petition for a writ of certiorari to the Court of Appeal of the State of California, Fourth Appellate district, Division Two.

Dated: November 3, 2000 Respectfully submitted,

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APPENDIX

To Petition for Writ of Certiorari to the Court of Appeal of the State of California, Fourth Appellate District, Division Two

CERTIFIED FOR PARTIAL PUBLICATION *

COURT OF APPEAL, FOURTH DISTRICT

DIVISION TWO

STATE OF CALIFORNIA

FILED MAR 13, 2000
COURT OF APPEAL
FOURTH DISTRICT

BANK OF AMERICAN) NATIONAL TRUST AND) SAVINGS ASSOCIATION,)	E022786
Plaintiff and Appellant,)	(Super Ct No SCV15956)
vs.)	OPINION
GIANT INLAND EMPIRE R.V.) CENTER, INC.,)	
Defendant and Appellant,)	
COUNTY OF SAN) BERNARDINO,)	
Defendant and Respondent)	

APPEAL from the Superior Court of San Bernardino County, Martin A. Hildreth, Judge. (Retired Judge of the Municipal Court for the West Judicial District, sitting under

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* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of parts III and IV.

assignment by the Chief Justice pursuant to art VI, § 6 of the Cal. Const.) Reversed.

Frandzel Share Robins Kaplan & Boom and Thomas M. Robins, III; Linda B Reed and Ullar Vitsut for Plaintiff and Appellant.

Kasdan, Simonds, McIntyre, Epstein & Martin and R. Donald McIntyre for Defendant and Appellant.

Alan K. Marks, County Counsel, and Dawn Stafford, Deputy County Counsel, for Defendant and Respondent.

Plaintiff and appellant Bank of America (Bank) appeals from a judgment in favor of defendant and respondent County of San Bernardino (County) and defendant and appellant Giant Inland Empire R.V. Center, Inc. (Giant), in an action by Bank to set aside a tax sale by the County to Giant of real property on which Bank had a secured lien. [1] Giant appeals from the post-judgment denial of its motion for attorney fees pursuant to Code of Civil Procedure section 1021.1.

We reverse the trial court's judgment because County failed to give reasonable notice of the tax sale to Bank. Accordingly, Giant's appeal regarding attorney fees becomes moot as Giant is no longer the prevailing party. [2]

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[1] Giant and County will sometimes be referred to as "defendants" for convenience.

[2] On January 4, 1999, Giant filed a request for additional findings of fact. Because Giant failed to provide exceptional circumstances to justify making new findings on this appeal, we deny Giant's request. (*Tyrone v. kelley* (1973) 9 Cal.3d 1, 13.) Moreover, on June 18, 1999,

FACTS AND PROCEDURAL HISTORY

Leon D. and Patricia Peskin owned the subject real property (Property). In 1987, Bank made a loan to the Peskins secured by a trust deed on the Property (Trust Deed). On July 22, 1987, Bank recorded the Trust Deed

The Trust Deed listed the following address for Bank:

> "Bank of America NT & SA
> P.O. Box 7127
> Pasadena, Ca 91101
> Lender
> Attn: Jim Davis, AVP"

Paragraph 10 of the Trust Deed stated that notices to Bank shall be given to Bank at the above-provided address, and that "[a]ny notice to [Bank] shall be given by first class mail to [Bank's] address stated herein or any other address [Bank] designates by notice to Borrower. Any notice provided for in this Security Instrument shall be deemed to have been given to . . . [Bank] when given as provided in this paragraph."

Paragraph 16 of the Trust Deed also stated that notices

Giant asked that we take judicial notice of documents related to Code of Civil Procedure section 1021.1. Because Giant's cross-appeal is moot, we deny its request for judicial notice. Furthermore, on February 1, 2000, Giant submitted an application for an order to allow acceptance of memorandum of out-of-state authorities on issues identified by the tentative opinion. Giant's application was denied at oral argument in February 2, 2000.

of foreclosures of liens with priority over the Trust Deed shall be sent to Bank at the same address provided above.

On September 16, 1988, Bank closed the post office box listed on the Trust Deed. Bank did not record a new address for giving notices regarding the Trust Deed.

On August 6, 1992, Bank did, however, record a notice of default and election to sell (Default Notice) directed to the Peskins, advising them that the Property was in foreclosure and in danger of being sold to pay the Peskins' indebtedness to Bank. The Default Notice stated that if the Peskins wanted to inquire as to the amount they must pay to stop foreclosure, they should contact Bank at "555 So. Flower Street, 9th Flr., Los Angeles, California 90071, (213) 228-2990 or (213) 228-2988." The Default Notice also indicated that the Peskins were delinquent in tax payments "in the approximate amount of $154,488.00 . . . . " Accordingly, at the time the Default Notice was recorded, Bank was aware of substantial tax defaults with respect to the Property.

Around November of 1993, County began efforts to obtain Bank's last known address. County ordered and obtained (1) a lot book report which also included a judgment and tax lien guaranty ("lot book report"), and (2) copies of the instruments identified in the lot book report. The lot book report identified the Trust Deed but not the Default Notice. Accordingly, County identified the Pasadena post office box on the Trust Deed as Bank's last known address.

Around February of 1994, County initiated proceedings

to sell the Property for nonpayment of property taxes pursuant to Revenue and Taxation Code section 3691. [3] County gave notice of the tax sale to Bank and other parties of interest as follows (1) County posted notice of the tax sale on the Property on March 15, 1994, (2) County published notice of the tax sale for three successive weeks in a newspaper of general circulation, and (3) County mailed the notice of the tax sale to Bank at the post office box address provided on the Trust Deed, via certified mail, on February 5, 1994. The post office processed the notice on February 9, 1994, and returned the notice to County as undeliverable. County received the return notice.

At the tax sale on March 28, 1994, the Property was sold by County to Giant, the highest bidder for $280,000. Just one day later, Bank discovered that the sale had occurred. The following day, Bank notified County, claiming it had not received notice of the sale.

On April 5, 1994, Bank filed a complaint to invalidate the tax sale of the Property to Giant, naming County, and served County with the complaint on April 5, 1994. Bank did not amend its complaint to name substitute Giant as "Doe 1" until six months later, November 7, 1994.

Thereafter, on April 28, 1997, the trial court granted Giant's motion, joined by County, to bifurcate the trial to address the issue of (1) whether Bank was entitled to set aside

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[3] All statutory references are to the Revenue and Taxation Code unless otherwise specified.

the tax sale, before the issue of (2) whether Bank was estopped from invalidating the sale.

On February 25, 1998, trial commenced on the first issue. After three days of testimony, the case was submitted on March 3, 1998. On March 9, 1998, the trial court announced its oral statement of decision in favor of County and Giant, and issued its written statement of decision on March 19, 1998.

In its statement of decision, the trial court found that Bank was not entitle to receive actual notice of the tax sale under Revenue and Taxation Code section 3701, but rather, that County must give reasonably calculated to give actual notice, and in this case, County's efforts "were reasonably calculated to give notice." Accordingly, the trial court entered judgment in favor of defendants and trial on the second issue was not necessary.

Bank appeals. [4]

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[4] County filed a notice of joinder on April 12, 1999, joining in Giant's brief filed on April 2, 1999.

ANALYSIS

1 County Failed to Make a Reasonable Effort to Obtain Bank's Last Known Mailing Address

Bank contends that its due process rights under the Fourteenth Amendment were violated because County failed to make a reasonable effort to obtain Bank's last known mailing address.

Both the United States Constitution and California Revenue and Taxation Code require that a tax collector make a reasonable effort to put interested parties on notice regarding an impending tax sale.

Under section 3701, [5] a tax collector is required to

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[5] Section 3701 states as follows:

"Not less than 45 days nor more than 120 days before the proposed sale, the tax collector shall send notice of the proposed sale by certified mail with return receipt requested to the last known mailing address, if available, of parties of interest, as defined in Section 4675. The notice shall state the date, time, and place of the proposed sale, the amount required to redeem the property, and the fact that the property may be redeemed up to the close of business on the last business day prior to the date of sale, and information regarding the rights of parties of interest to claim excess proceeds, as defined in Section 4674, if the property is sold and excess proceeds result from that sale.

"The tax collector shall make a reasonable effort to obtain the name and last known mailing address of parties of interest.

"The validity of any sale under this chapter shall not be affected if the tax collector's reasonable effort fails to disclose the name and last known mailing address of parties of interest or if a party of interest does not

"make reasonable effort to obtain the name and last known mailing address of parties in interest," but the "validity of any sale . . . shall not be affected . . . if a party of interest does not receive the mailed notice."

The United State Supreme Court has "recognized that prior to an action which will affect an interest in life, liberty or property protected by the Due Process Clause of the Fourteenth Amendment, a State must provide 'notice reasonably calculated , under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'" (Mennonite Board of Missions v. Adams (1983) 462 U.S. 791, 795 [103 S.Ct. 2706, 77 L.Ed.2d 180, 185] (hereinafter Mennonite), citing Mullane v. Central Hanover Bank & Trust Co. (1950) 339 U.S. 306, 314 [70 S.Ct. 652, 94; Ed. 865] (hereinafter Mullane).)

Although actual notice is not required, "'[t]he means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it . . .' [Citation]" (Sinclair & Valentine Co. v. County of Los Angeles (1988) 201 Cal.App.3d 1021, 1027 (hereinafter Sinlcair).)

In this case, there is no dispute that (1) County ordered a lot book report and documents identified in the lot book report to obtain Bank's last known mailing address. (2) The lot book report revealed Bank's post office address, as provided in the Trust Deed, (3) County mailed its notice regarding the tax

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receive the mailed notice."

sale to Bank's post office address, (4) Bank had closed its post office box, (5) Bank did not record a change of address, (6) Bank did not notify County regarding its change of address, (7) Bank did record a Default Notice, (8) The lot book report did not refer to the Default Notice, and (9) Bank did not receive the tax sale notice.

When facts are undisputed, the appellate court is confronted with a question of law and is not bound by the findings of the trial court. (Mole-Richardson Co. v. Franchise Tax Bd. (1990) 220 Cal.App.3d 889, 894.) Questions of law are reviewed de novo (Ghirardo v. Antonioli (1994) 8 Cal.4th 791, 800.)

Because there are no disputed facts in this case, we must independently determine whether County's practice of relying solely on a lot book report to obtain Bank's last known mailing address comports with the requirements under section 3701 and the Due Process Clause of the United States Constitution.

Before we can make this determination, we must first examine what a lot book report entails. According to Bank's expert witness, Professor John Hetland, a lot book report represents "a snapshot of raw data that appears in the files of the particular branch of the title company."[6] A lot book report would reveal "the owner, the last conveyance after fee, and any liens that appear to be outstanding," but would not reveal

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[6] Neither County nor Giant presented evidence to refute Professor Hetland's testimony.

"anything having to do with the official index, the grantor/grantee index, or anything that tracks the names of any parties." Hence, even if the lot book report reveals a recorded lien on a trust deed, it would not reveal any subsequent documents recorded with respect to that lien, except for a reconveyance.

Professor Hetland testified that ordering a lot book report would not be a reasonable method to use to obtain a lienholder's last known address: "It is simply ineffective and often misleading . . . [¶] [b]ecause you are not going to get the information you are looking for. It does not purport to give anything about names or addresses other than seeing the name that appears on the originally documents and that name commonly is the place where the document is returned by the recorder. [¶] And what you are after is the current name and address of people with an interest, not something that shows up on the original documents, often several years earlier." Professor Hetland testified that a preliminary title report, at a minimum, should be obtained because it would provide documents recorded subsequent to the original document creating the lien.

Professor Hetland's testimony was consistent with the State Controller's Manual in effect at the time of the sale. In a chapter entitled "parties of interest search," the State Controller's Office warned tax collectors against the use of lot book reports: "Be careful when ordering a report from a title company. The type of report that is ordered is very important.

'Lot book,' . . . reports will only provide a portion of the needed information. The only report which will provide complete information is a 'Preliminary' report."

Moreover, County's own "custom and practice in 1994 for ascertaining the correct address for those persons entitled to receive notice of a tax sale of real property" was to obtain addresses "from the assessment roll for the subject property and from documents recorded against the subject property in the public records."

Hence, it is apparent that County was fully aware that lot book reports provided limited information for obtaining the last known addresses of interested parties. Had County ordered a preliminary title report or followed its custom and practice by reviewing documents recorded against the Property, County would have discovered the Default Notice containing Bank's current address. [7]

Nevertheless, defendants claim that County gave proper notice of tax sale to the address listed on the Trust Deed "County had every reason to believe [the post office box address] was the address to which Bank wanted notices [to be sent] regarding the trust Deed." (Emphasis in original.) Defendants' argument fails because County's reliance on the lot book report -- which showed only the Trust Deed and *no other documents recorded subsequent to the recording of the*

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[7] County admitted that if they revealed more than one address for a party in interest, it would have mailed the notice of tax sale to each address.

Trust Deed -- was not reasonable. How could County have known that the address on the Trust Deed was the last known mailing address when its procedures utilized to assess the last known address would not reveal any other documents recorded with regard to that Trust Deed -- not even a recorded change of address -- except for a reconveyance?

Moreover, section 3701 requires that County "make a reasonable effort to obtain the name and *last known mailing address* of parties of interest." (Italics added.) The last known mailing address for Bank was provided in the Default Notice, regardless to whom the Default Notice was addressed. In fact, the Trust Deed stated that notices to Bank shall be given to the address stated in the Trust Deed, "or any other address [Bank] designates *by notice to Borrower*." In the Default Notice, Bank designates a new address for the Peskins, the borrowers, which the County should have utilized.

In conclusion, we hold that the County's sole reliance on a lot book report, which would not provide notice of documents recorded after the creation of a lien, does not constitute a reasonable effort to obtain the "last known mailing address of parties of interest" under section 3701. Hence, notice provided to addresses based solely on information obtained from a lot book report is not "'notice reasonably calculated, under all circumstances, to apprise interested parties'" of the tax sale. (Mennonite, supra, 462 U.S. 791, 795 [103 S.Ct.2706, 77 L.Ed.2d 180, 185].).

II. Bank's Due Process Rights Were Violated When County Did Not Re-Notice the Tax Sale Once County Was Aware Bank Did Not Receive Notice of Tax Sale

Even if County's efforts to obtain Bank's last known mailing address by obtaining a lot book report were deemed reasonable, County still violated Bank's due process rights when it failed to resend notice to Bank, after its initial notice of tax sale was returned to County before the tax sale. [8]

There is no dispute that County's tax sale notice was returned to County by the post office indicating it was undeliverable. Once County became aware that the notice was undeliverable, it then knew that Bank did not receive notice of the scheduled tax sale. At that time, it should have made reasonable efforts to renotice Bank regarding the tax sale. The parties dispute whether the notice of tax sale was returned before or after the tax sale.

We apply two standards of review, substantial evidence and independent review, to different aspect of the case. (See, generally, Eisenberg, Cal. Practice Guide, Civil Appeals and Writs (1995) § 8.32 et seq.) First, we review the trial court's determination of questions of law independently. "The proper interpretation of statutory language is a question of law which

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[8] Professor Hetland testified that, if a tax collector were to use a lot book report and everyone received notice, the County's efforts might be deemed proper. However, "if that notice starts coming back, then you surely have to do more."

this court reviews de novo, independent of the trial court's ruling or reasoning. [Citations]" (*Plunkett v. Spaulding* (1997) 52 Cal.App.4th 114, 126, overruled on other grounds in *Schreiber v. Estate of Kiser* (1999) 22 Cal.4th 31, 40.) Second, the trial court's factual finding, i.e., that it could not be determined when County's notice to Bank was returned to County, is reviewed under the substantial evidence standard. "When a trial court's factual determination is attacked on the ground that there is no substantial evidence to sustain it, the power of an appellate court begins and ends with the determination as to whether, on the entire record, there is substantial evidence, contradicted or uncontradicted, which will support the determination . . . ." (Bowers v. Bernards (1984) 150 Cal.App.3d 870, 873-874, original italics.)

In Sinclair, supra, Frye industries, Inc. (Frye) conveyed to the plaintiff, by grant deed, two parcels of unimproved real property in the City of Santa Fe Springs, County of Los Angeles. (Sinclair, supra, 201 Cal.App.3d 1021, 1024.) The County of Los Angeles, however assigned the two parcels three separate tax identification number ("parcel two"). (*Ibid.*)

One year later, the plaintiff relocated its principal offices from New York to Ohio. The secured tax rolls relating to the first parcel were updated to reflect this and subsequent changes in the plaintiff's address, as well as the facts that Frye was no longer the record owner of the property. However, the secured tax rolls relating to parcel two, the subject of the litigation on appeal, were not updated. (Sinclair, supra, 201

Cal.App.3d at p. 1024.) Thereafter, the assessments on parcel two were mailed to Frye, in care of the plaintiff, at the New York address previously shared by both companies. For thirty months, the bills were forwarded to and paid by the plaintiff. But, once the post office ceased providing this service, the bills were returned to the County of Los Angeles, marked "undeliverable." The tax bills on parcel one, however, were mailed to the various updated addresses and duly paid. (Sinclair, supra, 201 Cal.App.3d at p. 1025.) When the County of Los Angeles did not receive the tax assessments for parcel two, it set the parcel for tax auction. (*Ibid.*) The County of Los Angeles "purported to inform both Frye Industries and plaintiff of the proposed sale by sending notices thereof to the same New York address it had futilely utilized previously. As a consequence, and quite anticipatably, these documents were also returned undelivered." (*Ibid.*) The court noted that the County of Los Angeles made no further effort to determine the plaintiff's correct address, "either by simply checking the tax collector's own name index, or by referring to a local telephone directory for the Santa Fe Springs area . . . . " (*Ibid.*) The court noted that "[i]t has long been recognized that 'when notice is a person's due, process which is a mere gesture is not due process . . .'" (201 Cal.App.3d at p. 1027, quoting Mullane, supra, 339 U.S. 306, 315.) Based on these facts, the court stated "we can but uphold the trial court's determination, which, as noted the County does not contest, that the County's failure, under the circumstances here present, to undertake the

relatively modest administrative burden required to discover plaintiff's whereabouts before proceeding with a sale which would irrevocably extinguish its legally protected property interest constituted a violation both of California statutory law and the due process clause of the Fourteenth Amendment." (Sinclair, supra, 201 Cal.App.3d 1021, 1027.)

Analogously, once County here was aware that Bank did not receive notice of the tax sale -- i.e. if it received notice of tax sale back indicating that it was not delivered prior to the tax sale -- County should have realized the notice it sent was a "mere gesture," and not due process, and County should have "[undertaken] the relatively modest administrative burden required to discover plaintiff's whereabouts before proceeding with a sale which would irrevocably extinguish its legally protected property interest." (Sinclair, supra, 201 Cal.App.3d at p. 1027.) Accordingly, the key issue is whether County received the returned notice prior to conducting the tax sale on the Property.

The trial court, in its statement of decision, agreed, and stated that "[i]f the county received the return of the undelivered notice before the sale, it would have been obligated to look further using, for example. a preliminary title report, assessor's rolls, telephone books, etc. for a later address to which notice should be directed." The trial court, however, found that the "evidence fails to establish that the county had timely notice of a bad address for plaintiff." We hold that there is unsufficient evidence to support the trial court's finding and

instead, the evidence supports a finding the County received the returned notice prior to the tax sale.

In this case, County conceded it had actually received the returned notice but could not definitely say when it had done so. The presumption under the circumstances was that it had "been received in the ordinary course of mail." [9] (Evid. Code § 641.) [10] County presented no evidence to rebut this presumption.

The evidence presented during trial showed County mailed, via certified mail, a notice of tax sale to Bank on February 5, 1994. On February 9, 1994, the envelope containing the notice of tax sale was marked by the Pasadena post office, "Return to sender, forward order expired, unable to forward" and returned to San Bernardino. Although County admitted receiving the returned notice from the post office, no one from County could remember when it was returned. Hence, County argues that the returned notice could have been received after the tax sale on March 28 -- nearly seven weeks

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[9] County argues that Evidence Code section 641 is not applicable because there is no evidence that the letter was properly addressed or mailed. The notice, however, was returned, as directed by the return receipt that was filled out by County. County does not argue its own address, provided on the return receipt, was incorrect. Moreover, although County argues that there is no proof that the returned notice was properly mailed, the evidence supports a finding that the returned notice was properly mailed by the post office in Pasadena.

[10] Evidence Code section 641 states "[a] letter correctly addressed and properly mailed is presumed to have been received in the ordinary course of mail."

after the Pasadena post office stamped the notice as undeliverable and returned it to San Bernardino.

Contrary to County's assertion, uncontroverted testimony from the post office employees indicated that the usual time for an undeliverable letter to returned from Pasadena to San Bernardino ranges from one to three days. Once it reached San Bernardino, the post office employee from San Bernardino testified that it should have taken two to three days to deliver the returned mal. The trial court, however, stated that "[t]his testimony was undermined by the admission that it *could* take much longer." (Italics added) There is no evidence to support this finding.

The trial court reached this finding because "[t]he realities of letter delivery are such that a machinery malfunction, misplacement of the returned notice, ineffectual efforts of postal workers, etc., *could have* worked to delay the return of this particular notice for an unknown period of time." (Italics added.) These findings are based on the testimony of postal workers who testified that it is "possible" for mail to take fourteen years to arrive, mistakes do happen, mail is misplaced, and that there are "a number of things that *might* prevent the mail from being delivered as quickly as the process" described, such as mail getting jammed in a sorting machine. (Italics added.) Both postal employees, however, agreed that it was unlikely the tax notice got jammed in a machine because there was no evidence of damage to the envelope. There was no evidence of an other irregularity, either, inasmuch as County

actually did receive the returned notice.

These statements, which the trial court relied upon, only stated all the "possible" things that might happen. However, "'[a] finding of fact must be inference
drawn from evidence rather then on a mere speculation as to the probabilities without evidence. A majority of chances never can suffice alone to establish a proposition of fact, since the slightest real evidence would outweigh all contrary probabilities.' [Citation]" (Krause v. Apodaca (1960) 186 Cal.App.2d 413, 418.)

Furthermore, we note that Bank informed County that it had not received notice about the tax sale just two days after the sale occurred. Thus, County was fully aware that Bank had not received notice of the sale immediately after the tax sale occurred. Accordingly, it is a fair inference that, had County received the returned notice only after the tax sale and after Bank's assertion that County failed to provide notice of the sale, County employees would have remembered that fact. (Cowan v. Tremble (1931) 111 Cal.App. 458, 465 [when an addressee testified he was unable to remember the date of receiving a letter, the court held that it was a fair inference, that had the letter been received after the critical period mentioned, "he would have remembered the fact"].)

Defendants rely on the testimony of County's tax sales supervisor. The supervisor testified it was the custom and practice of County to resend notices of tax sales if they were returned before the tax sale. Here, no new notice was sent,

therefore, defendants urge that we can infer that County must have received the returned notice after the sale. The tax supervisor's testimony, however, does not actually support defendants' claim.

Although the supervisor testified to County's general custom and practice, she also stated that if a notice was sent to a *lienholder*, such as Bank, and not the taxpayer, and there was no forwarding address on the returned envelope, *no further efforts would be made to locate the lienholder.* It is also interesting to note that in County's responses to special interrogatories, County stated that if a notice of tax sale is returned as undeliverable before the tax sale has occurred, and if the notice had been sent to the correct address, as County argues in this case, "the practice of the Tax Collector is *to attempt* to find another address and resend the notice *if possible*, but not to cancel the sale." (Italics added.) County's evidence did not unequivocally establish a likelihood it would have sent a new notice if it had received the returned initial notice to Bank. According to County's evidence, in fact, it is fair to infer that, because Bank is a lienholder, not the taxpayer, County would not have made any further efforts to resend the notice of tax sale after the initial notice was returned.

Moreover, County's own employees could not state when the returned notice was returned. County contributed to this state of affairs, as County employees testified they did not date stamp the returned notice of tax sale, and did not keep a log of when County received returned notices of tax sales. No

one at County in fact knew when the notice it sent to Bank was returned to County. Ultimately, there was no evidence to rebut the presumption that County received the returned notice in the "ordinary course of mail."

From the uncontroverted testimony and the undisputed fact that the post office returned and County actually received the returned initial notice, the only reasonable inference is that notice, date stamped February 9, 1994, from Pasadena, was returned long before the tax sale on March 28, 1994.

Accordingly, once County became aware that Bank had not received notice regarding the tax sale, it knew that mailing the notice to the defunct post office box was futile. At that time, County should have made reasonable efforts to renotify Bank about the tax sale at an alternate address. In this case, the effort would have been minimal, as the address of Bank America could be easily obtained. Because County failed to make any effort at all to renotify Bank about the tax sale, Bank's due process rights were violated and it had the right to set aside the tax sale. [11]

III. The Peskins Are Not Indispensable Parties

Defendants contend that the judgment in favor of Giant and county should be affirmed because Bank failed to name the

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[11] Because the trial was bifurcated, the issue of whether the tax sale is void or whether Bank is estopped from voiding the tax sale may be determined at the second trial.

Peskins in this case, who are alleged indispensable parties, and the statute of limitations bars the joinder of the Peskins.

Code of civil Procedure section 389, subdivision (a), states as follows "A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties or (2) he claims an interest relating to the subject of the action and is so situated that he disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been joined, the court shall order that he be made a party."

"The controlling test for determining whether a person is an indispensable party is, 'Where the plaintiff seeks some type of affirmative relief which, if granted, would injure or affect the interest of a third person not joined, that third persons is an indispensable part. [Citation]' [Citation] A more recent statement of the same rule is that, 'A person is an indispensable party if his or her rights must necessarily be affected by the judgment.' [Citation]' [Citation]" (Save Our Bay, Inc. v. San Diego Unified Port Dist. (1996) 43 Cal.App.4th 686, 692-693.)

In this case, defendants claim that the Peskins are indispensable parties because their rights will be affected by the

judgment in this action. We disagree.

First, defendants claim that the Peskins must be named as parties because the alleged excess proceeds from the amount paid by giant at the tax collector's auction will be returned to Giant, and not paid to the Peskins. The Peskins, however, are not entitled to the excess proceeds because they failed to file a timely claim for the excess proceeds.

Section 4675 states that "[a]ny party of interest in the property may file with the county a claim for the excess proceeds, in proportion to his or hers interest held with others of equal priority in the property at the time of sale, at any time prior to the expiration of one year following the recordation of the tax collector's deed to the purchaser."

Here, the tax collector's deed was recorded on April 22, 1994. There is nothing in the record to indicate that the Peskins filed a timely claim for the excess proceeds. Because the one-year period to file a claim has expired, the Peskins have forfeited any interest in the excess proceeds. Hence, this action will have no impact on the Peskins with regard to excess proceeds.

Second, defendants claim that the Peskins are indispensable parties because Bank must prove that it made loan to the Peskins, Bank had a deed of trust on the Property, and the loan was outstanding. We fail to see how these facts, if proven, will affect the Peskins. The recorded Trust Deed already establishes that bank made a loan to the Peskins that was secured by the Property. Moreover, all the judgment in

this case would do is confirm or set aside the tax sale to Giant. Hence, although Bank may have to prove that the loan was delinquent for standing purposes, the judgment will not evaluate the Peskins' liability to Bank.

Third, defendants claim that the Peskins are indispensable parties because they may incur possible environmental, tort and financial liability if their ownership in the Property is restored, and the Peskins should be afforded an opportunity to prevent imposition of ownership. Defendants' argument lacks merit. Whether the Peskins may incur future liability is not relevant. In this case, the gravamen of Bank's complaint is to set aside the tax sale of the Property to Giant by County based on County's failure to give notice of the tax sale to Bank. Whether the Peskins are named in this lawsuit will have no bearing on the outcome of the case since they had nothing to do with County's failure to give notice of the tax sale to Bank. If the Peskins do not want ownership restored, they have no basis upon which to make such an argument. Moreover, even if the Peskins can make such an argument, the same argument, i.e. to confirm the tax sale to Giant, has been "ably argued" by both County and Giant, who want the identical result. (See Save Our Bay, Inc. v. San Diego Unified Port Dist, supra, 42 Cal.App.4th 686, 695-696.)

Accordingly, Bank's complaint states facts sufficient to constitute an action to set aside the tax sale since the Peskins are not indispensable parties to this action.

IV. Bank Is Not Required To Pay

Taxes to County Prior to Voiding the Tax Sale

Defendants contend that the judgment in favor of Giant and County should be affirmed because Bank failed to pay or offer to pay the taxes on the Property.

In support of their argument, defendants rely solely upon Glunt v. City etc. of San Francisco (1969) 274 Cal.App.2d 269, 278, which stated that "[a]n *owner* of property has an equitable and a moral obligation to pay his taxes. Courts of equity will not restrain or set aside tax proceedings, even if erroneous, at the instance of one who, without cause, fails to pay or offer to pay, such taxes as he admittedly *owes.*" (Italics added.) Glunt is distinguishable. In Glunt, the plaintiff was the owner of the property and the person responsible for paying the taxes on the subject property. In this case, Bank was not the owner of the Property. Instead, it was the lienholder who was entitled to get notice of the tax sale so it would have an opportunity to bid on the Property. Hence, Glunt is not applicable.

Moreover, section 3728 [12] expressly states that bank has up to six months after the court determines that tax sale is void

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[12] Section 3728 states that "[b]efore holding any tax deed . . . to be void, the court shall determine the correct amount of taxes, penalties and costs that should be paid upon redemption to discharge the tax and assessment liens of all taxing agencies and revenue districts had the purported tax sale not been held and the court shall order the former owner *or other party in interest to pay that amount within six months . . . .*" (Italics added.)

before it must pay the taxes.

Accordingly, Bank's complaint is not barred because Bank failed to pay or offer to pay the delinquent taxes prior to the court's determination that the tax sale to Giant is void.

DISPOSITION

The judgment is reversed and the trial court is directed to enter an order that Bank is entitled to set aside the tax sale from County to Giant, and to proceed to trial on the bifurcated issue of whether Bank is estopped from invalidating the tax sale. Plaintiff shall recover costs on appeal.

/s/ Ward
J.

We concur

/s/ Hollenhorst
Acting P.J

/s/ Gaut
J.

Fourth Appellate District, Division Two, No E022786

S087657

IN THE SUPREME COURT OF CALIFORNIA

EN BANC

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOC., Appellant

v.

INCORPORATED GIANT INLAND EMPIRE R.V. CENTER, Appellant

COUNTY OF SAN BERNARDINO, Respondent

Appellant's petitions for review DENIED.

Baxter, J., and Chin, J., did not participate.

/s/ George
Chief Justice

SUPREME COURT
FILED
JUN 14, 2000
Frederick K. Ohlrich, Clerk
DEPUTY

FILED-Central District
San Bernardino County Clerk
MAR 19, 1998
By: /s/ Lori Mawler
Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF SAN BERNARDINO, CENTRAL DISTRICT

BANK OF AMERICA, etc. Plaintiff vs. COUNTY OF SAN BERNARDINO etc. et al Defendant	)	CASE NO. SCV-15955 STATEMENT OF DECISION

This matter came on for trial by the court on February 25, 1998. The plaintiff was represented by its counsel, Thomas M. Robins, III. The defendant County of San Bernardino was represented by Dawn Stafford, Deputy County Counsel. Defendant Giant Inland Empire R.V. Center, Inc. was represented by its counsel, R. Donald McIntyre.

Plaintiff brought this action to quiet title for cancellation of a tax deed, and for declaratory relief.

After considering the evidence presented by all parties during the trial of this matter, both oral and documentary, the matter was taken under submission. The court makes the following mixed findings of fact and conclusions of law.

On July 22, 1987, plaintiff recorded with the defendant San Bernardino County (hereinafter "county") a deed of trust securing a note in the amount of $2,030.000. The deed of trust contained a Pasadena post office box number. (Exhibits 2, 1034)

For some inexplicable reason, plaintiff closed its Pasadena post office box on September 16, 1988 via a letter to the Pasadena postmaster. The letter indicated that as of October 22, 1988 plaintiff's new address is in Brea. (Exhibit 52) There is no evidence that the plaintiff made any effort to formally notify the county of that closure or of any new address to be used for future notification purposes.

The post office forwards mail for twelve months and for an additional six months will return mail to the sender marked with the new address. Both periods of time expired before the occurrence of events critical to the tax sale in this case.

On August 6, 1992 plaintiff recorded a notice of default and election to sell and a substitution of trustees all of which were directed to the defaulting debtors. The notice contained a Los Angeles address for the plaintiff (to be used for purposes not pertinent to this case) and a Glendale address for the new trustee. (Exhibit 4)

By October 15, 1992, plaintiff was aware that past due property taxes were substantial, about $142,000, and must be paid without delay to avoid a tax sale. (Exhibit 1024)

On February 5, 1994, the county mailed to plaintiff, via certified mail, a notice of a tax sale. The notice was sent to the

defunct Pasadena post office box. (Exhibit 9)

On February 9, 1994, the envelope containing the notice of tax sale was marked by the Pasadena post office as follows "Return to sender, forward order expired unable to forward."

Testimony from post office employees indicated that the usual time for an undeliverable letter to be returned from Pasadena to San Bernardino ranges from two to three days. This testimony was undermined by the admission that it could take much longer. An examination of Exhibit 9, the returned envelope, elicited the further admission that it was not possible to say when the envelope was returned to the sender.

The county published an announcement of the tax sale and on March 15, 1994, it posted the property (Exhibit (27). Please did not receive actual notice of the date of the tax sale before the sale occurred.

On March 28, 1994, the county conducted a tax sale, with defendant Giant Inland Empire R.V. Center, Inc. purchasing the property for $280,000.

Plaintiff's deed of trust created a valid lien on the property up to March 28, 1994. Plaintiff was a "party of interest" within the meaning of Revenue and Taxation code Section 3701 as of March 28, 1994.

During March 1994 plaintiff was experiencing personnel lay-offs and the file for the lien in this case was reassigned to Dawn L. Kinney, a vice-president working in the special assets group. She left for a week's vacation, returning on March 28, 1994. On March 29, 1994, she reviewed

plaintiff's file. She discovered that there was an unpaid balance on the note of $1,800,000 and that the property taxes were delinquent. She called the county and learned that the property had been sold in a tax sale the day before (Exhibit 1025). This litigation followed.

Was plaintiff a party of interest entitled to actual receipt of notice from the county? No. Revenue and Taxation Code Section 3701 provides that the validity of any sale shall not be affected if a party in interest does not receive the mailed notice.

The method chosen by the county, however, must be reasonably calculated to give actual notice. This is a requirement of the due process clause of the Fourteenth Amendment Mennonite Bd. of Missions v. Adams, 103 S.Ct. 2706, 2709. The county's efforts in this case were reasonably calculated to give notice. The publishing, posting, and, in particular, the mailing of notice to the last known address of plaintiff, meet the requirements of due process.

The county's use of a lot book guarantee was sufficient as it supplied the last known address of plaintiff. The requirements of due diligence are met under the circumstances of this case.

If the county received the return of the undelivered notice before the sale, it would have been obligated to look further using for example a preliminary title report, assessor's rolls, telephone book, etc., for a later address to which notice should be directed.

Evidence Code Section 641 provides that a letter

property mailed is presumed to have been received in the ordinary course of mail. In this case, the return of the notice on February 9, 1994, by the Pasadena post office should have resulted in its return to the county in two to three days, long before the tax sale. In the absence of evidence to the contrary, the presumption materially assists plaintiff's case. If the court applies the presumption, the county was required to expend additional effort to locate a valid address or remove the property from the tax sale. The county did neither of these things.

In this case testimony from postal employees defeats the presumption. The realities of letter delivery are such that a machinery malfunction, misplacement of the returned notice, ineffectual efforts of postal workers, etc., could have worked to delay the return of this particular notice for an unknown period of time.

The county's policy of not noting or dating returned notices thwarts both plaintiff and this court in determining if the returned notice was received by the county before the tax sale. Such policy nevertheless does not relieve plaintiff of its burden of proof, that is, to show that the returned notice was received before the tax sale. This burden has not been sustained by plaintiff. The evidence fails to establish that the county had timely notice of a bad address for plaintiff.

The court finds that the county used a procedure reasonably calculated to give notice and that the evidence is insufficient to establish that there was timely notice that the

address used for plaintiff was invalid. The court notes in passing plaintiff's efforts to either avoid or participate in a tax sale were too little and too late. Due process does not require the tax collector to save a party from its own failure to act reasonably in protecting its own interests.

The court awards judgment to the defendants plus court costs.

Dated: March 19, 1998

/s/ Martin A. Hildreth
MARTIN A. HILDRETH, Judge

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FILED-Central District
San Bernardino County Clerk
MAR 11 1998
By: /s/ Lori Mawler Deputy

Attorneys for Defendant,
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SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN BERNARDINO

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, a national banking association, Plaintiff, v. COUNTY OF SAN BERNARDINO, a political subdivision of the State of California, and GIANT INLAND EMPIRE R.V. CENTER, INC., Defendants.	Case No.: SCV15956 **JUDGMENT** **Hon. Martin A. Hildreth, Judge** Trial Date: February 25, 1998 Dept: 7

This case came on regularly for trial beginning on February 25, 1998, in Department 7 of the above-entitled court, the Honorable Martin A. Hildreth, Judge, presiding sitting without a jury, the parties having agreed that they were not

entitled to a jury. Plaintiff, Bank of America National Trust and Savings Association, appeared by its attorney, Thomas M. Robins, III, of Frandzel, Share, Robins, Kaplan & Bloom. Defendant County of San Bernardino appeared by its attorney, Dawn Stafford, Deputy County Counsel. Defendant Giant Inland Empire R.V. Center, Inc., appeared by its attorney, R. Donald McIntyre of Kasdan, Simonds, McIntyre, Epstein & Martin. Evidence, both oral and documentary, having been presented by the parties, the case having been argued and submitted for decision, and the court having announced its statement of decision orally on the record in the presence of the parties, a statement of decision not having been requested by any party,

IT IS ORDERED, ADJUDGED, AND DECREED that:

1. Plaintiff Bank of America National Trust and Savings Association shall take nothing by its complaint from or against the defendants, County of San Bernardino and Giant Inland Empire R.V. Center, Inc., or either of them; and

2. Defendants County of San Bernardino and Giant Inland Empire R.V. Center, Inc., shall have and recover from plaintiff Bank of America National Trust and Savings Association costs and disbursements.

Dated: MAR 11, 1998

/s/ Martin A. Hildreth
Judge of the Superior Court

Selected Sections of the California Revenue and Taxation Code

§ 3691. Power to sell; Effect on redemptive rights of sale of parcel

(a) (1) Five years or more after the property has become tax defaulted, the tax collector shall have the power to sell and shall attempt to sell in accordance with Section 3692 all or any portion of tax-defaulted property that has not been redeemed, without regard to the boundaries of the parcels, as provided in this chapter, unless by other provisions of law the property is not subject to sale. Any person, regardless of any prior or existing lien on, claim to, or interest in, the property, may purchase at the sale. In the case of tax-defaulted property that has been damaged by a disaster in an area declared to be a disaster area by local, state, or federal officials and whose damage has not been substantially repaired, the five-year period set forth in this subdivision shall be tolled until five years have elapsed from the date the damage to the property was incurred.

(2) When a part of a tax-defaulted parcel is sold, the balance continues subject to redemption and shall be separately valued for the purpose of redemption in the manner provided by Chapter 2 (commencing with Section 4131) of Part 7.

(b) (1) (A) Three years or more after the property has become tax defaulted and subject to a nuisance abatement lien , the tax collector shall have the power to sell and may sell all or any portion of tax-defaulted property that has not been redeemed, without regard to the boundaries of parcels, as provided in this chapter, unless by other provisions of law the property is not subject to sale. Any person, regardless of any prior or existing lien on, claim to, or interest in, the property, may purchase at the sale.

(B) When a part of a tax-defaulted parcel is sold, the balance continues subject to redemption and shall be separately valued for the purpose of redemption in the manner provided by Chapter 2 (commencing with Section 4131) of Part 7.

(2) Before the tax collector sells vacant residential developed property pursuant to this subdivision, actual notice, by certified mail, shall be provided to the property owner, if the property owner's identity can be determined from the county assessor's or county recorder's records. The tax collector's power of sale shall not be affected by the failure of the property owner to receive notice.

(3) Before the tax collector sells vacant residential developed property pursuant to this subdivision, notice of the sale shall be given in the manner specified by Section 3704.7.

§ 3691.1. Notice to Controller when parcel subject to power of sale

The tax collector shall execute a notice whenever a parcel becomes subject to the power of sale set forth in Section 3691 on a form prescribed by the Controller. The county clerk shall take acknowledgment of the notice without charge.

§ 3691.2. Contents of notice to Controller

The notice shall specify:

(a) That five years or more have elapsed since the taxes or assessments on the parcel were declared in default.

(b) That the property was duly assessed for taxation and the tax legally levied.

(c) That the property is subject to sale for nonpayment of taxes.

(d) The amount of taxes originally declared to be in taxes, a redemption from a ...

§ 3692. Attempts to sell; Procedures governing mineral rights and unusable parcels

(a) The tax collector shall attempt to sell tax-defaulted property as provided in this chapter within four years of the time that the property becomes subject to sale for nonpayment of taxes unless by other provisions of law the property is not subject to sale. If there are no acceptable bids at the attempted sale, the tax collector shall attempt to sell the property at intervals of no more than six years until the property is sold.

(b) When oil, gas, or mineral rights are subject to sale for nonpayment of taxes, the tax collector may offer the interest at minimum bid to the holders of outstanding interests where the interest subject to sale is a partial interest or, where the interest subject to sale is a complete and undivided interest, to the owner or owners of the property to which the oil, gas, or mineral rights are appurtenant.

(c) When parcels that are rendered unusable by their size, location, or other conditions are subject to sale for nonpayment of taxes, the tax collector may offer the parcel at a minimum bid to owners of contiguous parcels. The tax collector shall require that the successful bidder request the assessor and the planning director to combine the unusable parcel with his or her own parcel as a condition of sale.

(d) Sealed bid sale procedures shall be used when offers are made pursuant to subdivision (b) or (c), and the property shall be sold to the highest eligible bidder. The offers shall remain in effect for 30 days or until notice is given pursuant to Section 3702, whichever is later.

(e) The Notice of Power to Sell Tax-Defaulted Property, Notice of Power and Intent to Sell Tax-Defaulted Property, Notice to the Board of Supervisors, and Notice of Intended Sale of Tax-Defaulted Property shall indicate that any parcel remaining unsold may be resold within a 90-day period and any new parties of interest shall be notified in accordance with Section 3701. This subdivision shall not apply to properties sold pursuant to Chapter 8 (commencing with Section 3771).

§ 3693. Manner of sale

With the exception of sealed bid sale procedures authorized under Section 3692, all sales pursuant to this chapter shall be at public auction to the highest bidder. The amount of the high bid shall be paid in cash in lawful money of the United States or negotiable paper or any combination thereof which the tax collector specifies.

§ 3693.1. Credit sale

Notwithstanding Section 3693, if the high bid is in excess of five thousand dollars ($ 5,000), the tax collector may make the sale a cash or credit transaction. In the event the tax collector approves the successful purchaser's request to treat the sale as a credit transaction, five thousand dollars ($ 5,000) or 10 percent of the purchase price, whichever is greater, shall be deposited with the tax collector and the balance of the purchase price shall be paid in cash in lawful money of the United States or negotiable paper as specified by the tax collector within a period specified by the tax collector not to exceed 90 days from the date of the auction as a condition precedent to the transfer of title to that successful purchaser. Failure on the part of the successful

bidder to consummate the sale within the period specified by the tax collector shall result in the forfeiture of the deposit and all rights he or she may have with respect to that property. Any forfeiture of deposit shall be distributed to the county general fund and shall not apply to outstanding delinquent taxes. Upon forfeiture the right of redemption shall revive.

§ 3698.5. Minimum sale price; "Total amount necessary to redeem"; "Costs"

(a) Except as provided in Section 3698.7, the minimum price at which property may be offered for sale pursuant to this chapter shall be an amount not less than the total amount necessary to redeem, plus costs. For purposes of this subdivision:

(1) The "total amount necessary to redeem" is the sum of the following:

(A) The amount of defaulted taxes.

(B) Delinquent penalties and costs.

(C) Redemption penalties.

(D) A redemption fee.

(2) "Costs" are those amounts described in subdivisions (a) and (b) of Section 4112, Sections 4672, 4672.1, 4672.2, 4673, and subdivision (b) of Section 4673.1.

(b) This section shall not apply to property or interests that qualify for sale in accordance with the provisions of subdivisions (b) and (c) of Section 3692.

(c) Where property or property interests have been offered for sale at least once and no acceptable bids therefor have been received at the minimum price determined pursuant to subdivision (a), the tax collector may, in his or her discretion and with the approval of the board of supervisors, offer that same property or those interests at the same or next scheduled sale at a minimum price that the tax collector deems appropriate in light of the most current assessed valuation of that property or those interests, or any unique circumstance with respect to that property or those interests.

Selected Sections of the California Revenue and Taxation Code

§ 3701. Notice of proposed sale; Contents

Not less than 45 days nor more than 120 days before the proposed sale, the tax collector shall send notice of the proposed sale by certified mail with return receipt requested to the last known mailing address, if available, of parties of interest, as defined in Section 4675. The notice shall state the date, time, and place of the proposed sale, the amount required to redeem the property, and the fact that the property may be redeemed up to the close of business on the last business day prior to the date of sale, and information regarding the rights of parties of interest to claim excess proceeds, as defined in Section 4674, if the property is sold and excess proceeds result from that sale.

The tax collector shall make a reasonable effort to obtain the name and last known mailing address of parties of interest.

The validity of any sale under this chapter shall not be affected if the tax collector's reasonable effort fails to disclose the name and last known mailing address of parties of interest or if a party of interest does not receive the mailed notice.

Selected Sections of the California Revenue and Taxation Code

§ 3702. Publication or posting of notice

The tax collector shall publish the notice of intended sale once a week for three successive weeks in a newspaper of general circulation published in the county seat and in a newspaper of general circulation published in the judicial district in which the property is situated. If the same newspaper of general circulation is published in both the county seat and in such district, or if the publication of the notice of sale is made in a newspaper which is determined pursuant to Section 3381 as most likely to afford adequate notice of the sale, publication in

such paper shall satisfy the requirements for publication set forth in this section. If there is no newspaper published in the county seat or in the judicial district, then publication may be made by posting notice in three public places in the county seat or in the judicial district, as the case may be, where no such newspaper is published. The publication shall be started not less than 21 days prior to the sale.

§ 3703. Posting of notice where property deemed unlikely to return cost of publication

If in the judgment of the board of supervisors any property to be sold under this chapter will bring at auction less than the cost of publication in a newspaper, the publication of the notice of intended sale may be made in the same manner as if there were no newspaper published in the county seat or in the judicial district.

§ 3704. Contents of notice

The notice of intended sale shall state all of the following:

(a) The date, time, and place of the intended sale.

(b) A description of the property to be sold.

(c) The name of the last assessee of the property.

(d) The minimum acceptable bid of the property to be sold.

(e) There shall also be a statement that if the property is not redeemed before the close of business on the last business day prior to the date of the sale, the right of redemption will cease.

(f) If the property is sold, parties of interest, as defined in Section 4675, have the right to file a claim with the county for any proceeds from the sale which are in excess of the liens and costs required to be paid from the proceeds.

(g) If excess proceeds result from the sale, notice will be given to parties of interest, pursuant to law.

(h) If the parcel remains unsold after the tax sale, the date, time, and location of any subsequent sale.

§ 3706. Conduct of sale; Minimum bids

If the property is not redeemed before the close of business on the last business day prior to the date of the sale of the property, the tax collector shall sell property at public auction to the highest bidder at the time and place fixed.

In the case of a sale at public auction, no bid shall be accepted for a sum less than the minimum price approved in the resolution of the board of supervisors; provided, however, the tax collector may reduce such minimum price when a partial redemption has been made under Chapter 2, Part 7, Division 1 of this code, or when a partial cancellation has been made under Chapter 4, Part 9, Division 1 of this code, after such price was fixed, by not more than the ratio that the delinquency on the portion so redeemed or canceled bears to the delinquency upon the whole.

§ 3707. Termination of redemptive rights

(a) The right of redemption shall terminate at the close of business on the last business day prior to the date the sale begins.

(b) Notwithstanding any other provision of law, any remittance sent by mail for redemption of tax-defaulted property must be received in the tax collector's office prior to the time established in subdivision (a).

(c) The sale shall be deemed complete when a qualified bid is accepted by the tax collector.

(d) The right of redemption revives if the property is not sold.

§ 3708.1. Recordation of deed

Upon execution the tax collector shall immediately record the deed with the county recorder and pay the recording fees. Recording of the deed shall constitute delivery thereof to the grantee named in the deed.

§ 3708.5. Corrected deed

If a deed to the purchaser contains a clerical error or misstatement of fact, a corrected deed may be issued by the tax collector and recorded with the county recorder without charge. The new deed shall contain a statement of reasons for its issuance and, as far as practical, shall be the same as the original except where corrected.

Selected Sections of the California Revenue and Taxation Code

§ 3710. Recitals of deed

In addition to the usual provisions of a deed conveying real property, the deed shall specify all of the following:

(a) That the legally levied taxes on the subject property were duly declared to be in default and were a lien on the property.

(b) That the tax collector, pursuant to a statutory power of sale, has sold the property.

(c) If a taxing agency objected to the sale, the fact of the objection and the name of the objecting taxing agency.

(d) The name of the purchaser, the date of sale, and the amount for which the property was sold.

(e) That the property is therefore conveyed to the purchaser according to law.

§ 3711. Evidentiary effect of deed

Except as against actual fraud, the deed duly acknowledged or proved is conclusive evidence of the regularity of all proceedings from the assessment of the

assessor to the execution of the deed, both inclusive.

§ 3712. Title conveyed by deed; Excepted encumbrances

The deed conveys title to the purchaser free of all encumbrances of any kind existing before the sale, except:

(a) Any lien for installments of taxes and special assessments, which installments will become payable upon the secured roll after the time of the sale.

(b) The lien for taxes or assessments or other rights of any taxing agency which does not consent to the sale under this chapter.

(c) Liens for special assessments levied upon the property conveyed which were, at the time of the sale under this chapter, not included in the amount necessary taxing agency which collects its own taxes has consented to the sale under this chapter, not included in the amount required to redeem from sale to the taxing agency.

(d) Easements constituting servitudes upon or burdens to the property; water rights, the record title to which is held separately from the title to the property; and restrictions of record.

(e) Unaccepted, recorded, irrevocable offers of dedication of the property to the public or a public entity for a public purpose, and recorded options of any taxing agency to purchase the property or any interest therein for a public purpose.

(f) Unpaid assessments under the Improvement Bond Act of 1915 (Division 10 (commencing with Section 8500) of the Streets and Highways Code) which are not satisfied as a result of the sale proceeds being applied pursuant to Chapter 1.3 (commencing with Section 4671) of Part 8.

(g) Any federal Internal Revenue Service liens which, pursuant to provisions of federal law, are not discharged by the sale, even though the tax collector has provided proper notice to the Internal Revenue Service before that date.

(h) Unpaid special taxes under the Mello-Roos Community Facilities Act of 1982 (Chapter 2.5 (commencing with Section 53311) of Part 1 of Division 2 of Title 5 of the Government Code) that are not satisfied
as a result of the sale proceeds being applied pursuant to Chapter 1.3 (commencing with Section 4671) of Part 8.

§ 3725. Limitations period for contesting proceedings

A proceeding based on alleged invalidity or irregularity of any proceedings instituted under this chapter can only be commenced within one year after the date of execution of the tax collector's deed.

Sections 351 to 358, inclusive, of the Code of Civil Procedure do not apply to the time within which a proceeding may be brought under this section.

§ 3726. Limitations period for asserting defense of irregularity

A defense based on the alleged invalidity or irregularity of any proceeding instituted under this chapter can be maintained only in a proceeding commenced within one year after the date of execution of the tax collector's deed.

Selected Sections of the California Revenue and Taxation Code

§ 3727. Purchaser's quiet title action

Whenever property has been purchased at tax sale, the purchaser or any other person claiming through the purchaser may bring suit to quiet title to all or any portion of the property and prosecute it to final judgment.

§ 3728. Payments required to be made before voiding deed

Before holding any tax deed heretofore or hereafter given under this chapter or Chapter 8 (commencing with Section 3771), former Chapter 3 (commencing with Section 3475), former Chapter 4.3 (commencing with Section 3534), or former Sections 3897 and 3897d of the Political Code to be void, the court shall determine the correct amount of taxes, penalties and costs that should be paid upon redemption to discharge the tax and assessment liens of all taxing agencies and revenue districts had the purported tax sale not been held and the court shall order the former owner or other party in interest to pay that amount within six months as follows:

(a) To the purchaser, or his or her grantee or successor in interest, the amount of taxes, penalties and costs expended by him or her as determined by the court in pursuit of title to the property, and when the purchaser at that sale or the grantee in any deed for taxes or his or her grantee or successor in interest is in possession of that property in good faith and claiming the property under a tax deed, which is regular upon its face, and has made permanent improvements thereon, the court shall not make that decree until there has also been repaid to the purchaser or his or her grantee or successor in interest a sum, as determined by the court, equal to the amount by which the value of the property has been enhanced by those permanent improvements; and

(b) To the county tax collector, the balance, if any, of the correct amount as determined by the court that should be paid upon redemption, which shall be distributed by the county to the taxing agencies and revenue districts as redemption money.

If the amounts are not paid in accordance with the order the court shall not hold the tax deed void.

§ 3728.1. Failure to make reimbursement; Issuance of new deed; Quieting title of grantee

If the amount required to be paid in accordance with Section 3728 of this code is not paid within such six months, the court shall order a new tax deed issued by the county tax collector to the original grantee or his successor in interest as designated in the order. The tax collector shall thereupon execute and deliver a new tax deed which in addition to the usual provisions of a deed conveying real property shall specify:

(a) The oldest year in which a tax lien attached which has not been discharged.

(b) That the court ordered the payment of the correct amount of taxes, penalties and costs, stating the title of the court, the number of the case, the date of the order and the total amount of such taxes, penalties and costs so ordered paid.

(c) That such payment has not been made as ordered by the court.

(d) If the original assessment description was erroneous, the correct description as determined by the court.

Upon proof of the execution and delivery of such tax deed the court shall quiet the title of the grantee and his successors in interest and after such judgment becomes final the tax deed shall be conclusively presumed valid against the claims of any parties to the lawsuit and their successors in interest.

§ 3729. Refund of purchase price in excess of reimbursement

(a) When a court holds a tax deed given under this chapter or Chapter 8 (commencing with Section 3771), former Chapter 3 (commencing with Section 3475), former Chapter 4.3 (commencing with Section 3534), or former Sections 3897 and 3897d of the Political Code void, the purchaser at tax sale is entitled to a refund from the county of the amount paid as the purchase price in excess of the amount for which he or she has been reimbursed for taxes, penalties, and costs. The refund shall be made in the same manner as a refund of an overpayment of tax, except that the claim shall be presented within one year after the judgment becomes

final.

(b) The holder of a tax certificate who received all or any part of the amount paid by the delinquent taxpayer shall not be obligated to make any refund or repayment of any amount to either the purchaser, the county, or any other person. The tax collector may use amounts on deposit in the Tax Certificate Redemption Fund to make the refund, but only to the extent those amounts were paid to the holder of the applicable tax certificate.

§ 4674. Excess proceeds retained in delinquent tax sale trust fund; Subsequent distribution

Any excess in the proceeds deposited in the delinquent tax sale trust fund remaining after satisfaction of the amounts distributed under Sections 4672, 4672.1, 4672.2, 4673, and 4673.1 shall be retained in the fund on account
of, and may be claimed by parties of interest in the property as provided in, Section 4675. At the expiration of one year following the recordation of the tax deed to the purchaser, any excess proceeds not claimed under Section 4675 shall be distributed as provided in paragraph (2) of subdivision (a) of Section 4673.1, except prior to the distribution, the county may deduct those

costs of maintaining the redemption and tax-defaulted property files, and those costs of administering and processing the claims for excess proceeds, that have not been recovered under any other provision of law.

§ 4675. Claims for excess proceeds

Any party of interest in the property may file with the county a claim for the excess proceeds, in proportion to his or her interest held with others of equal priority in the property at the time of sale, at any time prior to the expiration of one year following the recordation of the tax collector's deed to the purchaser.

After the property has been sold, a party of interest in the property at the time of the sale may assign his or her right to claim the excess proceeds only by a dated, written instrument that explicitly states that the right to claim the excess proceeds is being assigned, and only after each party to the proposed assignment has disclosed to each other party to the proposed assignment all facts of which he or she is aware relating to the value of the right that is being assigned. Any attempted assignment that does not comply with these requirements shall have no effect. This paragraph shall apply only with respect to

assignments on or after the effective date of this paragraph. In addition, any person or entity who in any way acts on behalf of, or in place of, any party of interest with respect to filing a claim for any excess proceeds shall submit proof with the claim that the amount of excess proceeds has been disclosed to the party of interest and that the party of interest has been advised of his or her right to file a claim for the excess proceeds on his or her own behalf.

The claims shall contain any information and proof deemed necessary by the board of supervisors to establish the claimant's rights to all or any portion of the excess proceeds.

No sooner than one year following the recordation of the tax collector's deed to the purchaser, and if the excess proceeds have been claimed by any party of interest as provided herein, the excess proceeds shall be distributed on order of the board of supervisors to the parties of interest who have claimed the excess proceeds in the order of priority set forth in subdivisions (a) and (b). For the purposes of this article, parties of interest and their order of priority are:

(a) First, lienholders of record prior to the recordation of the tax deed to the purchaser in the order of their priority; and

(b) Then, any person with title of record to all or any portion of the property prior to the recordation of the tax deed to the purchaser.

Any action or proceeding to review the decision of the board of supervisors shall be commenced within 90 days after the date of that decision of the board of supervisors.

FILED-Central Disctrict
San Bernardino County Clerk
OCT 14 1994
By: /s/Janet L. Dean
Deputy

RECEIVED
OCT 11 1994
Superior Court/County Clerk

TOBIN & TOBIN
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94 APR-5 PM12:57
CLERK U.S. DISTRICT COURT
CENTRAL DIST. OF CALIF LOS ANGELES
By: _____

Attorneys for Plaintiff
BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, a national banking association

THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

BANK OF AMERICAN NATIONAL TRUST AND SAVINGS ASSOCIATION, a national banking association,	)	CASE NO. SCV 15956 SA-CV94321 AHS (RWRX)
Plaintiff,	)	COMPLAINT TO

vs.	) QUIET TITLE TO REAL PROPERTY;
COUNTY OF SAN BERNARDINO, a political subdivision of the State of California, and DOES 1 THROUGH 100 inclusive, and all other persons unknown claiming any right, title, estate, lien, or interest in the real property described in the Complaint adverse to plaintiff's lien, or any cloud upon plaintiff's title thereto,	) CANCEL TAX SALE; CANCEL TAX DEED; AND FOR DECLARATORY RELIEF
	) Case Management Conference set for MAY 12, 1995, Attendance is mandatory. Case assigned to Judge Wade Dept. B, Time 8:30 a.m. Central
Defendants.	

Plaintiff BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, a national banking association, complaints of defendants above named, and each of them, as follows:

JURISDICTION AND VENUE

1. This is an action to annul a tax sale, cancel a tax deed and to quiet title to certain real property which defendant COUNTY OF SAN BERNARDINO purported to sell at a tax sale without notice to Plaintiff. This Court has jurisdiction of this action because there is a federal question (i.e. the Due Process Clause of the Fourteenth amendment to the Constitution of the United States) with respect to the fact that the purported tax sale was conducted pursuant to a statute

(i.e. California revenue and Taxation Code Section 3701) which is unconstitutional on its face because it does not require notice by mail or other means as certain to ensure actual notice to a beneficiary of a deed of trust, such as Plaintiff, of the pending tax sale. Further, the said statute was applied in a manner which was unconstitutional for lack of Due Process to Plaintiff because a tax sale was conducted by defendant COUNTY OF SAN BERNARDINO without such notice to Plaintiff.

2. The amount in controversy in this action exceeds the sum of Fifty Thousand Dollars and no/100 ($50,000.00), exclusive of interest and costs.

3. This is a civil action of a local nature in that it involves title to real property located in the COUNTY OF SAN BERNARDINO, State of California and is therefore within this District.

4. Plaintiff is informed and believes that thereon alleges that the claim arose in this District.

5. That the purported tax sale conducted by the COUNTY OF SAN BERNARDINO on or about March 28, 1994, was defective in that the procedures provided for in California Revenue and Taxation Code Section 3701 for notice to lienholders such as Plaintiff do not comply with the Due Process Clause of the Fourteenth Amendment to the

Constitution of the United States of America, insofar as defendant COUNTY OF SAN BERNARDINO was not required to give actual or mailed notice to Plaintiff of the pendency of the sale for a valid tax sale, and in fact the COUNTY OF SAN BERNARDINO failed to give such notice to Plaintiff.

THE PARTIES

6. Plaintiff BANK OF AMERICA NATIONAL TRUST & SAVINGS ASSOCIATION, is a national banking association (hereinafter "Plaintiff" or "BANK"), duly organized and existing under the laws of the United States of America, with its principal place of business in the City and County of San Francisco, State of California.

7. Defendant COUNTY OF SAN BERNARDINO is now and was at all times mentioned herein a political subdivision of the State of California.

8. Defendants herein named as DOES 1 through 100, inclusive, and all other persons unknown claiming any right, title, estate, lien, or interest in the real property described herein, are unknown to Plaintiff. Plaintiff is ignorant of the true names and capacities of said defendants sued herein as DOES 1 through 100, inclusive, and therefore sues these defendants by such fictitious names. Plaintiff will amend this

Complaint to allege their true names and capacities when ascertained.

9. Plaintiff is informed and believes, and thereon alleges, that by reason of the said tax sale each of the defendants sued herein, including DOES 1 through 100, inclusive, has, or claims to have, some interest or claim to the hereinafter described real property, which is commonly known as 650 Auto Center Drive, City of San Bernardino, State of California.

ALLEGATIONS COMMON TO ALL CLAIMS FOR RELIEF

10. Prior to July 16, 1987, Leon D. Peskin and Patricia A. Peskin (collectively the "Peskins") were the owners of that certain parcel of real property situate in the County of San Bernardino, State of California (hereinafter the "Property"), described as follows:

> Parcel 9 Parcel Map No. 9713 as per plat Recorded in Book 106 of Parcel Maps, Pages 91 to 93 inclusive, San Bernardino County Records. APN # 0141-251-61-0-000

11. On or about July 16, 1987, the BANK made a loan to the Peskins, as a part of the loan transaction, a

Promissory Note ("Note") in the principal amount of Two Million Thirty Thousand and no/100 ($2,030,000.000) was duly executed by the Peskins, as borrowers, with interest thereon at the rate of the reference rate plus one percent per annum. On July 16, 1987, as a part of the same transaction, the Peskins duly executed and delivered to "BANK , as beneficiary, and Continental Auxiliary Company, a California corporation, as trustee, that certain Deed of trust, which was thereafter recorded on July 22, 1987, as Instrument No. 87-249444, San Bernardino County Official records (hereinafter the "Deed of Trust"). Said Deed of Trust is a first lien upon the Property. True and correct copies of the Note and Deed of trust are attached hereto marked as Exhibits "A" and "B", respectively, and incorporated herein by this reference.

12. The loan secured by the Deed of Trust has not been paid or satisfied and in law and equity the Deed of Trust is and should remain a valid first lien upon the Property.

13. On August 6, 1992, the BANK recorded as Instrument No. 92-327748, a Substitution of Trustee, which substituted Equitable Deed Company, a California corporation, as trustee, under the Deed of Trust in the place of Continental Auxiliary Company.

14. On August 6, 1992, the BANK recorded, as Instrument No.. 92-327749, a Notice of Default and Election to

Sell Under Deed of Trust against the Property.

15. On or about September 16, 1993, Defendant COUNTY OF SAN BERNARDINO, by and through its Treasurer - Tax Collector, Tom O'Donnell, recorded a Notice of Power to Sell Tax-defaulted Property. The COUNTY OF SAN BERNARDINO never sent to the BANK notice of the scheduled tax sale of the Property.

16. On or about March 28, 1994, Defendant COUNTY OF SAN BERNARDINO sold the Property to Defendant DOES 1 through 10 (the "Tax Sale") and a tax deed was issued to defendant DOES 1 through 10 which was to be recorded in Official Records of San Bernardino County, State of California (the "Tax Deed").

17. Bank never received notice by registered mail or any other notice from Defendant COUNTY OF SAN BERNARDINO notice relative to the scheduled tax sale of the Property.

18. BANK is informed and believes that, prior to the Tax Sale, the Tax Collector of Defendant COUNTY OF SAN BERNARDINO did not make a reasonable effort to obtain the last known address of BANK as required by Revenue and Taxation code Section 3701.

19. The failure to give BANK personal or mailed notice of Defendant COUNTY OF SAN BERNARDINO's intent to sell the Property deprived BANK of its right to Due Process of law as guaranteed by the Fourteenth Amendment of the Constitution of the United States.

FIRST CLAIM FOR RELIEF

(To Quiet Title Against All Defendants)

20. BANK incorporates herein by this reference paragraph 1 through 19, inclusive, above as though fully set forth herein.

21. This action involves the Property and the cloud upon the lien of Plaintiff's Deed of Trust by reason of the Tax Sale and the Tax Deed.

22. Plaintiff seeks a determination of its right, title, lien and interest in and to its lien on the Property, free and clear of any cloud, license, lien or encumbrance created by the Tax Sale or the Tax Deed.

23. The basis of Plaintiff's interest in the Property free and clear of the Tax Deed, is as follows:

(a) That BANK's Deed of Trust is a first priority lien upon the Property by virtue of being duly recorded

in the Official Records of San Bernardino County, State of California, and BANK is the beneficiary of the Deed of Trust.

(b) That the COUNTY OF SAN BERNARDINO failed to give personal or mailed notice to BANK of its intention to have a Tax Sale of the Property in violation of BANK's right to Due Process of law.

(c) That the COUNTY OF SAN BERNARDINO failed to comply with Revenue and Taxation Code Section 3701 in that it failed to send to the BANK registered mail notice of its intention to have a Tax Sale of the Property and did not take reasonable steps to discover the last know address of BANK to which notice could have been sent.

(d) That BANK did not receive notice of the intention of the COUNTY OF SAN BERNARDINO to hold a Tax Sale of the Property and could not, thereby take steps to protect its interest in the Property.

(e) That under the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States, the BANK was entitled to be sent notice by mail or other means as certain to ensure actual notice of the intention of the COUNTY OF SAN BERNARDINO to hold a Tax Sale of the Property.

(f) That the Tax Sale and Tax Deed are void in that BANK was not given the notice required by the California statute or the Fourteenth Amendment to the Constitution of the United States before the COUNTY OF SAN BERNARDINO held a Tax Sale of the Property.

24. Plaintiff seeks to quiet title to the lien of its Deed of Trust on the Property, free and clear of the Tax Sale and Tax Deed, as of March 28, 1994.

WHEREFORE, Plaintiff prays for judgment as hereinafter set forth.

SECOND CLAIM FOR RELIEF
(For Cancellation of the Tax Deed
Against All Defendants)

25. BANK incorporates herein by this reference paragraphs 1 through 24, inclusive, above as if fully set forth herein.

26. By reason of a failure of the COUNTY OF SAN BERNARDINO to give BANK constitutional and statutorily required notice of its intent to hold a Tax Sale of the Property, the Tax Sale and Tax Deed are void and the Tax Deed should be canceled and removed from record title of the Property.

WHEREFORE, Plaintiff prays for judgment as hereinafter set forth.

THIRD CLAIM FOR RELIEF

(Declaratory Relief Against All Defendants)

27. BANK incorporates herein by this reference paragraphs 1 through 26, inclusive, above as if fully set forth herein.

28. An actual controversy has arisen and exists between Plaintiff and defendants concerning the Tax Sale and Tax Deed. Plaintiff contends that the Tax Sale and Tax Deed are void or voidable in that the COUNTY OF SAN BERNARDINO failed to give BANK constitutionally and statutorily mandated notice of its intent to hold a Tax Sale of the Property.

29. BANK is informed and believes and therein alleges that defendants, and each of them, dispute and contest each and every of the foregoing contentions.

30. BANK desires a judicial determination of its rights and the lack of any title in favor of Defendant DOES 1 through 10, in the Property.

31. Such a declaration is necessary and

appropriate at this time in that Plaintiff does not otherwise have an adequate remedy at law, and a failure to resolve these legal issues will result in irreparable harm and injury to Plaintiff in that it will be deprived of its interest in the Property without due process of law. Plaintiff has no plain, speedy, adequate remedy at law for the great and irreparable harm that it will thereby suffer.

WHEREFORE, Plaintiff prays for judgment as hereinafter set forth.

1. For a decree, order, and judgment of this Court that the tax Sale purportedly conducted on March 28, 1994, and the Tax Deed are null, void and of no effect.

2. That the defendant COUNTY OF SAN BERNARDINO be ordered to rescind the said Tax Sale and cancel the said Tax Deed;

3. For a judgment that defendants, and each of them, have no legal or equitable right, title, estate, lien or interest in and to the Property adverse and/or prior to the lien of Plaintiff's Deed of Trust or to Plaintiff's title therein, and that any such claim or claims of defendants are without any right whatsoever.

4. For a judgment and decree quieting title to

the Property as free and clear of the Tax Sale and Tax Deed.

5. For costs of suit.

6. For such other and further relief as the Court deems just and proper.

Date: April 4, 1994

TOBIN & TOBIN

By: /s/ John L. Hosack
John L. Hosak, Esq.
Attorneys for Plaintiff
BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, a national banking association

[Exhibit A, the Note, omitted.]

Submitted for Recordation)
By and Return to)
CHICAGO TITLE COMPANY)
Loan Number _____)
_____)
BANK OF AMERICA)
[Bank of America NT&SA])
P.O. Box 7127)
Pasadena, CA 91101)
Lender)
Attn: Jim Davis, AVP)
_____)

_____ (Space Above This Line For Recording Data ____

DEED OF TRUST

THIS DEED OF TRUST is made this 16th day of July 1987, among Trustor, Leon D. Peskins and Patricia A. Peskin, who are married to each other (herein "Borrower"), Continental Auxiliary Company (herein "Trustee"), and the Beneficiary, Bank of America National Trust and Savings Association, a national banking association, (herein "Lender").

BORROWER, in consideration of the indebtedness herein recited and the trust herein created, irrevocably grants and conveys to Trustee, in trust, with power of sale, the following described property located in the County of San Bernardino, State of California.

Parcel 9 Parcel M Map No 9713 as per plat recorded in book 106 of Parcel Maps, Pages 91 to 93 inclusive, San Bernardino County Records

Exhibit B

[Portion of Deed of Trust omitted.]

Borrower of Lender agree as follows:

[Portion of Deed of Trust omitted.]

10. Notices. Any notice to Borrower provided for in this Security Instrument shall be given by delivering it or by mailing it by first class mail unless applicable law requires use of another method. The notice shall be directed to the Property Address or any other address Borrower designates by notice to Lender. Any notice to Lender shall be given by first class mail to Lender's address stated herein or any other address Lender designates by notice to Borrower. Any notice provided for in this Security Instrument shall be deemed to have been given to Borrower or Lender when given as provided in this paragraph.

[Portion of Deed of Trust omitted.]

16. Request for Notices. Lender requests that copies of notices of foreclosure from the holder of any lien which has priority over this Deed of Trust be sent to Lender's address, as set forth on page one of this Deed of Trust, as provided by Section 2924b of the Civil Code of California.

[Balance of Deed of Trust omitted.]

Exhibit B

FILED-Central District
San Bernardino County Clerk
OCT 14 1994
By /s/ Janet L. Dean Deputy

FILED
JUL - 6 1994
CLERK U.S. DISTRICT COURT CENTRAL DISTRICT OF CALIFORNIA SANTA ANA OFFICE

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BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, a national banking association

THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

BANK OF AMERICAN) NATIONAL TRUST AND) SAVINGS ASSOCIATION, a) national banking association,)	SCV 15956 CASE NO. SA-CV94321 AHS
Plaintiff,	STIPULATION OF FACTS BETWEEN
vs.	PLAINTIFF BANK OF AMERICA AND
COUNTY OF SAN BERNARDINO, a political subdivision of the State of	DEFENDANT COUNTY OF SAN BERNARDINO AND

California, and DOES 1 THROUGH 100 inclusive, and all other persons unknown claiming any right, title, estate, lien, or interest in the real property described in the Complaint adverse to plaintiff's lien, or any cloud upon plaintiff's title thereto,	FOR REMAND TO STATE COURT; AND ORDER THEREON E022786
Defendants.	ENTERED JUL - 7 1994 CLERK U.S. DISTRICT COURT CENTRAL DISTRICT OF CALIFORNIA SANTA ANA OFFICE

IT IS HEREBY STIPULATED by and between Plaintiff, Bank of America National Trust and Savings Association, a national banking association ("Bank of America"), and Defendant, County of San Bernardino, a political subdivision of the State of California ("County"), as follows:

1. On or about February of 1994, the County initiated proceedings to sell the Property for non-payment of real property taxes.

2. From the date the tax sale proceedings were initiated (i.e., February of 1994), through the date the Property was sold at tax sale (i.e., March 28, 1994) and the tax deed delivered (i.e., April 19, 1994), the County had actual

notice of the lien of Bank of America's Deed of Trust.

3. The County attempted to provide notice to Bank of America of the pending tax sale as follows: (a) it "posted" the Property on March 15, 1994; (b) published an announcement of the tax sale; (c) mailed notice to Bank of America at a United States Post Office box in Pasadena, California by certified mail. The mailed notice was returned to the County by the United States Postal Service with the following notation:

"Return to Sender
Forward Order Expired
Unable to Forward"

4. No further effort was made by the County to determine an address at which mailed notice of the pending tax sale could be sent to Bank of America.

5. On or about March 28, 1994, the Property was sold by the County as tax sale to Giant Inland Empire R.V. Center, Inc., a California corporation ("Giant"). On or about April 19, 1994, a tax deed was executed and delivered by the County to Giant.

THE PARTIES HERETO FURTHER STIPULATE that this action be remanded to the State Court, and not dismissed,

and that each party bear its own costs incurred in the Federal Court and as a result of such remand.

The parties hereto agree that they may later assert additional facts, either individually or jointly, so long as such additional facts are not inconsistent with, or tend to refute, the facts stipulated herein.

This Stipulation shall be binding upon the parties hereto in all proceedings, including motions and trial, whether such proceedings take place in Federal Court or State Court.

Dated: July 5, 1994

TOBIN & TOBIN

By: /s/ Alan F. Chep
Alan F. Chep, Esq.
Attorneys for Plaintiff, Bank of America National Trust and Savings Association, a national banking association

Dated: July 1, 1994

ALAN K. MARKS,
County Counsel

By: /s/ Dawn Stafford
Dawn Stafford
Deputy County Counsel
Attorneys for Defendant County of San Bernardino, etc.

ORDER

Upon consideration of the Stipulation of the Parties for remand, and good cause appearing therefor,

IT IS HEREBY ORDERED that this action be remanded to the Superior Court For The County Of San Bernardino, and not be dismissed, each party to bear its own costs incurred in this Court and as a result of such remand. The order of dismissal filed 6-29-94 is vacated in light of this Stipulation.

DATED: July 6, 1994

By /s/ Alicemarie H. Stotler
Hon. Alicemarie H. Stotler
United States District Judge

I hereby attest and certify on 8/26/97 that the foregoing document is a full, true and correct copy of the original on file in my office, and in my legal custody.

CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT
OF CALIFORNIA [Court Seal]

By: /s/[signature not legible] Deputy